MINING AND WATER CASES ANNOTATED

A COLLECTION OF LEADING AMERICAN, CANADIAN AND ENGLISH CASES ON THE TOPICS OF IRRIGATION, DRAINAGE, RECLAMATION, MINING, OIL, GAS AND RELATED SUBJECTS, WITH ANNOTATIONS, INDEXES AND FORMS

By JAMES M. KERR III

OF THE CALIFORNIA BAR
EDITOR OF KERR'S CYCLOPEDIC CALIFORNIA CODES
AND
THE PUBLISHER'S EDITORIAL STAFF

VOLUME I

CHICAGO
CALLAGHAN AND COMPANY
1912

PREFACE.

The Mining and Water Cases Annotated are, as their name implies, a series of selected annotated cases upon the topics of Irrigation, Reclamation, Drainage, Mines, Oil, Gas and related subjects.

The selection of cases for the series will be with a two fold purpose: First to present all the current and important decisions upon the topics within the scope of the series; and second, to afford the widest possible range of annotations. Cases upon points which have already been annotated will not be printed when to afford space for them would exclude annotations, it being the desire of the publishers to make the annotations the prominent feature of the series. Canadian, English and other foreign cases will be included, especial attention being given to the law of Canada.

The annotations will be carefully and conscientiously done by competent editors under a definitely formulated plan whereby the series, as it enlarges, will become a working treatise on the law of Waters, Mines, Oil and Gas. Whether the notes are monographic or closely confined in scope the same care will be exercised in their compilation and arrangement, they will be carefully analyzed, and will be the result of a thorough examination of the authorities.

Practical forms will be included from time to time. For example, in this volume are presented forms for the organization of a drainage district under the laws of Illinois upon which many of the modern drainage statutes are based.

Each volume will contain carefully compiled indexes of cases, notes and forms.

In conclusion the publishers wish to express their appreciation of the valuable services rendered upon this volume by Mr. Herbert C. Lust of the Chicago Bar, by whom a large part of the material was collected and to whose efforts are in a great measure due its present form.

CALLAGHAN AND COMPANY.

Chicago, January, 1912.

TABLE OF CASES REPORTED

E.

F.

G.

H.

I.

J.

S.

U.

V.

W.

Y.

Z.

WATER AND MINERAL CASES

ANNOTATED

VOL. I

OREGON SHORT LINE RAILROAD COMPANY v. PIONEER IRRIGATION DISTRICT et al.

[Supreme Court of Idaho, opinion filed May 26, 1909; rehearing denied July 8, 1909.]
16 Idaho 578, 102 Pac. 904.

1. Irrigation District—Land to Be Included in—Use of Not Material.

The statute of this state authorizes the board of county commissioners to include within the boundaries of an irrigation district all lands which in their natural state would be benefited by irrigation and are susceptible of irrigation by one system; and this is true regardless of the question as to what particular use is being made of any particular tract or piece of land at the time the district is organized.

2. Railway within District—Confirmation—Estoppel.

Where a railroad corporation owns right of way and station grounds within the boundaries of a proposed irrigation district, and quietly sits by and makes no objection or protest to the organization of such district or the confirmation of the same, such railroad company is concluded by the action of the board of county commissioners in including such right of way and station grounds within the district and by the

NOTE.

Irrigation Districts, Formation and Management of.

judgment of the district court confirming such district, and cannot attack the jurisdiction of the district to assess such lands on the ground that the same were not benefited, in a collateral proceeding (following Knowles v. New Sweden Irrigation District, 16 Idaho, 217, 101 Pac. 81).

3. Right of Way and Station—Board Determining Benefit—Action Final.

Whether the right of way and station grounds of a railroad company will be benefited by a system of irrigation works within an irrigation district is committed to the judgment of the board of county commissioners; and when such board has determined that such land will be benefited, and includes such land within the boundaries of such district, the action of such board is final and conclusive against a collateral attack.

4. Right of Way and Depot Grounds—Question of Benefit—How Determined.

The mere fact that the railroad company for the time being is using its land for right of way and depot purposes is not a reason why such land will not be benefited by a system of irrigation works controlled by an irrigation district, as the question of benefits is to be determined with reference to the natural state and condition of the land and not with reference to the use being made of such land.

5. Determining Benefits—Board Not Limited to Agricultural Land.

In determining whether lands will be benefited by a system of irrigation works, the board of county commissioners is not limited to lands which will be used for agricultural purposes or upon which water will be beneficially used, or to lands devoted to any particular use; but the board is empowered and given jurisdiction to determine whether all lands within the district will be benefited, without reference to the use to which the same will be put.

6. Petition for Organization—Boundaries—Description of Tracts.

Section 2 of the Laws of 1899, p. 408, as amended by Laws 1901, p. 191, § 1, requires the petition for the organization of an irrigation district to describe the boundaries of such district, but does not require the petition to contain a specific and accurate description of each tract or legal subdivision of land within the district.

7. Notice—Of Presentation and Hearing—Description in.

Such statute does not require that the notice given of the presentation of the petition or the notice of the time when the same will be heard contain a description of the different tracts or legal subdivisions within the boundaries of the proposed district.

8. Examining Tracts—Apportioning Benefits.

Section 11 of the act (Laws 1899, p. 414), as amended by Act March 18, 1901 (Laws 1901, p. 194, § 2), requires the board to examine all tracts and legal subdivisions within the boundaries of the district, and to apportion the benefits according to their judgment.

9. Apportioning Benefits—Description of Tracts—Unnecessary When.

This provision of the statute, which requires the board to examine each particular legal subdivision or tract within the district and apportion the benefits, does not require the board, in designating the benefits, to particularly and specifically describe each tract or fractional part of such legal subdivision according to the separate ownership thereof where the benefits accruing to all parts of such legal subdivision are the same.

10. —— Necessary When.

If, however, in assessing the benefits, the board determine that any part or tract less than a legal subdivision be benefited differently from the remainder or any other part or tract, then the board is required to designate and describe the benefit to such particular tract or fractional part.

11. —— Proceeding in Rem—Lands Including Railway.

The benefits fixed by the board are laid against the land, the proceeding is a proceeding *in rem*, and the benefits have reference to the land; and where the board in preparing a list of the lands against which benefits are laid, designates upon such list the legal subdivisions across which the right of way of a railroad company

passes, and designates the rate per acre apportioned to each legal subdivision, it is a substantial compliance with the statute, and is not void because the right of way is not particularly and separately described.

12. List—Including Railway—Notice of Benefit—Collateral Attack.

The list thus prepared is notice to the railway company of the benefits assessed against each legal subdivision, of which its right of way is a part; and where the list has been thus prepared, and no objection is made by the company on account of a defective description or want of description at the time of the hearing of the confirmation of said district, the owner of such property is concluded in a collateral attack by the judgment.

13. Confirmation—Scope of Inquiry—Right to Be Heard.

Section 19, Laws 1899, p. 418, empowers the district court upon the hearing for confirmation, to determine the legality and regularity of all the proceedings taken with reference to the organization of said district and by such district up to the time the judgment of confirmation is rendered, including all proceedings affecting the legality or validity of the bonds issued by said district, and the apportionment of costs and the lists of such apportionment; and every person interested in said district is given an opportunity to appear and contest the same.

14. Confirmation Proceedings—Scope of Inquiry—Statutory Provision.

Section 2 of the Act of March 18, 1901 (Laws of 1901, p. 194), amending the Laws of 1899 (Laws 1899, p. 414, § 11), expressly provides that "The proceedings

Irrigation Districts, Formation and Management of.

I. In General.

A. Legislative Power.

1. General Principles.

The power of congress to pass an act is limited to authority specially conferred by the Federal Constitution. See Bozant v. Campbell, 9 Rob. (La.) 411 (1845). But the power of the state legislature to enact laws is limited or restricted by express inhibitions of the Constitution only.

United States.—Talcott v. Pine Grove Township, 1 Flip 120, 161, Fed. Cas. No. 13735 (1872).

California.—People v. Seymour, 16 Cal. 332, 76 Am. Dec. 521 (1860).

Connecticut.—Lowry v. Gredley, 30 Conn. 450 (1862).

Georgia.—Boston v. Cummins, 16 Ga. 102, 60 Am. Dec. 717 (1854).

Indiana.—Doe ex dem. Chandler v. Douglas, 5 Blackford (Ind.) 10, 44 Am. Dec. 732 (1846); Beebe v. State, 6 Ind. 501, 525, 540 (1855); Madison, etc. R. Co. v. Whiteneck, 8 Ind. 222 (1856); Lafayette & B. R. Co. v. Geiger, 34 Ind. 185 (1870).

Louisiana.—Bozant v. Campbell, 9 Rob. 411 (1845); State v. Gutierrez, 15 La. Ann. 190 (1860).

New York.—Bloodgood v. Mohawk & H. R. Co., 18 Wend. (N. Y.) 9, 31 Am. Dec. 313 (1837).

North Carolina.—State v. Moore, 104 N. C. 714, 10 S. E. 143, 17 Am. St. Rep. 696 (1889).

Vermont.—Thorpe v. Rutland R. Co, 27 Vt. 140, 62 Am. Dec. 625 (1854). *Compare* Cincinnati W. & Z. R. Co. v. Clinton County Com'rs, 1 Ohio St. 77 (1852).

Within this general power of the legislature is the right and power of providing for irrigation of certain kinds of land. See Fallbrook Irr. Dist. v. Bradley (dictum of Bradley, J.), 164 U. S. 112, 166, 41 L. Ed. 369, 391, 17 Sup. Ct. 56 (1896). Gutierres v. Albuquerque L. & Irr. Co., 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. 338 (1903). Board of Supervisors of Riverside County v. Thompson, 122 Fed. 860 (1903). In re Madera Irr. Dist., 92 Cal. 296, 28 Pac. 272, 675, 27 Am. St. Rep. 106, 14 L. R. A. 755 (1891).

The manner in which an irrigation district may be created, and the duties of the officers thereof, are matters which are determined by statute in that regard. See *post* V, A and B, 2, and VIII, A, this note.

of said board of directors in making such apportionment of cost, and the said list of such apportionment, shall be included, with other features of the organization of such district which are subject to judicial examination and confirmation, as provided in sections sixteen, seventeen, eighteen, nineteen and twenty of this act."

15. Assessing Benefits—Failure to List According to Ownership—Listing by Legal Subdivision.

The fact that the board of directors in assessing benefits to lands within an irrigation district, fail to list the lands according to each separate ownership, but do list the same according to each legal subdivision, does not show that the board did not intend to assess benefits to all of the lands within the legal subdivision.

16. Less than Legal Division Benefited—Procedure of Board.

The statute requires the board to assess benefits against each legal subdivision or tract within the district, and where less than a legal subdivision is benefited in a different degree or amount than the remainder of the legal subdivision or tract, then the board is required to fix and determine the benefits accruing to such particular tract; but where the entire legal subdivision or tract is benefited equally, then the board may lay the assessment against the legal subdivision, and thus include the smaller or fractional parts thereof.

2. Changes of Law—Retroactive Effect.

The statutes relating to the creation, organization and management of irrigation districts are subject to legislative change from time to time, and these changes retroact on existing districts. Thus, it has been held that the California Act of March 31, 1897 (St. 1897, p. 254), providing for the organization and government of irrigation districts, applies to existing districts organized under prior laws. Board of Supervisors of Riverside County v. Thompson, 122 Fed. 860 (1903).

3. Limitation of Power of Legislature.

The legislative power to change or modify irrigation district laws, however, is limited in that the legislature can regulate the management only; it cannot go to the extent of affecting any vested interests or rights, because the organization of an irrigation district is regarded as a contract between the state and the individuals whose property is affected thereby, and as such is protected by section 10 of article I of the Federal Constitution, preventing the state from passing laws impairing the obligation of contracts. Merchants' Nat. Bank v. Escondido Irr. Dist., 144 Cal. 329, 77 Pac. 937 (1904).

B. Legislative Discretion.

It is within the discretion of the legislature to determine the mode or manner in which an irrigation district shall be formed and managed, and it may authorize the inhabitants of a region or settlement, under restrictions and methods of procedure provided, to organize themselves into a public municipal corporation for governmental purposes; and such public municipal corporation need not be required to be formed in the manner, or provided with the powers of municipal corporations of this class. In re Madera Irr. Dist., 92 Cal. 296, 28 Pac. 272, 675, 27 Am. St. Rep. 106, 14 L. R. A. 755 (1891).

The legislature having exercised its discretion in this regard, it is not for the courts to question the policy or prudence of the law as it has been enacted, and it is no valid objection to the organization of the district that persons not interested in the land affected may compel the organization, or that the statute does not provide for a hearing from the owners of the land affected prior to the organization of the district. In re Madera Irr. Dist., 92 Cal. 296, 28 Pac. 272, 675, 27 Am. St. Rep. 106, 14 L. R. A. 755 (1891).

C. Constitutionality.

1. General Principles.

Acts providing for the organization and management of irrigation districts, which are general in their nature, applying equally to all persons embraced

17. Assessment—Neglect to Levy against Right of Way and Station Grounds —Effect of.

The fact that the officials of an irrigation district neglect to assess the right of way and station grounds of a railroad company for certain years is not a reason why such right of way and station grounds are not subject to assessment by said district; and the company cannot defeat a future assessment by reason of the fact that its property was not assessed for any particular year or years prior to the assessment made.

18. Assessing Benefits—Want of Notice of Proceeding—Due Process of Law.

The fact that the statute makes no provision for notice to the landowner that on a particular day the board of directors will assess benefits to the lands within the district will not render such statute unconstitutional, where the statute does provide for notice to be given of the proceedings to organize such district and notice of the hearing for the confirmation of the organization and proceedings of such district, at which hearing the court is required to examine all the proceedings involved in the organization of such district including the assessment of benefits.

within a class and founded upon a proper distinction (Escondido High School Dist. v. Escondido Seminary, 130 Cal. 128, 62 Pac. 401—1900) are constitutional in principle and are held valid where they keep within the scope of their object, and are not violative of any restrictions of the state or Federal Constitutions or of any fundamental rights guaranteed thereby.

United States.—Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. 56 (1896); Tulare Irr. Dist. v. Shepard, 185 U. S. 1, 13, 46 L. Ed. 773, 22 Sup. Ct. 531 (1902); Herring v. Modesto Irr. Dist., 95 Fed. 705 (1899).

Arizona.—Oury v. Goodwin, 3 Ariz. 255, 26 Pac. 376 (1891).

California.—Lamb v. Reclamation Dist., 73 Cal. 125, 14 Pac. 625, 2 Am. St. Rep. 775 (1887); Turlock Irr. Dist. v. Williams, 76 Cal. 360, 18 Pac. 379 (1888); Central Irr. Dist. v. De Lappe, 79 Cal. 351, 21 Pac. 825 (1889); Crall v. Poso Irr. Dist., 87 Cal. 140, 26 Pac. 797 (1890); In re Madera Irr. Dist., 92 Cal. 296, 27 Am. St. Rep. 106, 28 Pac. 272, 675, 14 L. R. A. 755 (1891); In re Central Irr. Dist., 117 Cal. 382, 49 Pac. 354 (1897); People v. Linda Vista Irr. Dist., 128 Cal. 477, 61 Pac. 86 (1900—Confirmatory Act of 1889); San Joaquin & Kings River Canal & Irr. Co. v. Stanislaus County, 155 Cal. 21, 99 Pac. 365 (1908—Act March 12, 1885, Stats. p. 85).

Colorado.—Anderson v. Grand Valley Irr. Dist., 35 Colo. 525, 85 Pac. 313 (1906—Laws 1901, p. 198).

Idaho.—Pioneer Irr. Dist. v. Bradley, 8 Idaho 310, 68 Pac. 295, 101 Am. St. Rep. 201 (1902); Nampa & M. Irr. Dist. v. Brose, 11 Idaho 474, 83 Pac. 499 (1905—Laws 1903, p. 15); Settlers Irr. Dist. v. Settlers Canal Co., 14 Idaho, 504, 94 Pac. 829 (1908).

Illinois.—See Elmore v. Drainage Commrs., 135 Ill. 269, 25 N. E. 1010, 25 Am. St. Rep. 363 (1890).

Iowa.—See Beebe v. Magoun, 122 Iowa 94, 97 N. W. 986, 101 Am. St. Rep. 259 (1904).

Missouri.—See Mound City L. & S. Co. v. Miller, 170 Mo. 240, 70 S. W. 721, 94 Am. St. Rep. 727, 60 L. R. A. 190 (1902).

Nebraska.—Paxton & Hurshey Irr. C. & L. Co. v. Farmers & M. L. & Irr. Co., 45 Neb. 884, 64 N. W. 343, 50 Am. St. Rep. 585, 29 L. R. A. 853 (1895); Board of Directors of Alfalfa Irr. Dist. v. Collins, 46 Neb. 411, 64 N. W. 1086 (Act March 26, 1895).

New York.—See Matter of Tuthill, 163 N. Y. 133, 79 Am. St. Rep. 574, 57 N. E. 303, 49 L. R. A. 781 (1900).

Oregon.—Umatilla Irr. Co. v. Barnhart, 22 Or. 389, 30 Pac. 37 (1892); Little Walla Walla Irr. Dist. v. Preston, 46 Or. 5, 78 Pac. 982 (1904).

Washington.—Lewis County v. Gordon, 20 Wash. 80, 54 Pac. 779 (1898); Kin-

19. Assessment—For Maintenance and Bonded Indebtedness—Validity.

If the records show that the board of directors, in levying an assessment for maintenance and to pay the bonded indebtedness of an irrigation district, substantially complied with the statute, and the assessment roll is made up in substantial compliance with the statute, the assessment thus levied will be upheld if the description of the property is sufficient to give the landowner notice that such property is burdened with such assessment.

20. —— Of Railroad Property—Jurisdiction of State Board of Equalization.

The power and jurisdiction of the state board of equalization with reference to the assessment of railroad property has reference to assessments made for general state, county, and municipal purposes, and not to assessments made for local improvements.

21. —— Territory Not Within District—Jurisdiction.

Where territory has not been included within the boundaries of an irrigation district in accordance with the laws governing the taking of territory into an irrigation district, the district has no power or jurisdiction to assess the property so included.

22. Change of Boundaries—Want of Notice—Effect of.

Where it appears that an irrigation district has attempted to change the boundaries of such district so as to include other territory, but has failed to give the notice

cade v. Witherop, 29 Wash. 10, 69 Pac. 399 (1902). See Board of Directors Middle Kittitas Irr. Dist. v. Peterson, 4 Wash. 147, 29 Pac. 995 (1892).

Thus, an act of this nature providing for the assessment of land in an irrigation district according to the value of the land, and not according to the benefit to be received by each parcel, to pay for the public improvement, is constitutional, except in case of an express constitutional prohibition, for the reason that such assessments are included in the inherent power of taxation, which is not limited to benefits received. In re Madera Irr. Dist., 92 Cal. 296, 307, 28 Pac. 272, 675, 27 Am. St. Rep. 106, 14 L. R. A. 755 (1891); Schall v. Norristown, 6 Leg. Gaz. (Pa.) 157 (1874). See *post* VII, A and E, this note.

2. California Statutes.

Irrigation district legislation, under which a municipal public corporation may be created for the purpose of furnishing water for the irrigation of the land within the district, has been sustained upon the same ground as has the levee and reclamation district legislation, which is, in effect, that the land included within the limits of such district requires, by reason of its situation and condition, the protection or reclamation thus made possible, and that it is for the public welfare that such protection or reclamation should be afforded such land. Jenison v. Redfield, 149 Cal. 500, 87 Pac. 62 (1906). See In re Madera Irr. Dist., 92 Cal. 296, 311-318, 28 Pac. 272, 675, 27 Am. St. Rep. 106, 14 L. R. A. 755 (1891).

The California Act of March 7, 1887 (Sess. Laws 1887, p. 29), known as the Wright Act, providing for the organization and government of irrigation districts and the provisions thereof relative to the condemnation of private property, land, water, etc., for the uses, are constitutional.

United States.—Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. 56 (1896); Herring v. Modesto Irr. Dist., 95 Fed. 705, 715, 716 (1899); People ex rel. Brady v. Brown's Valley Irr. Dist., 119 Fed. 535, 538 (1902).

California.—Turlock Irr. Dist. v. Williams, 76 Cal. 360, 18 Pac. 379 (1888); Central Irr. Dist. v. De Lappe, 79 Cal. 351, 353, 21 Pac. 825 (1889); Crall v. Poso Irr. Dist., 87 Cal. 140, 26 Pac. 797 (1890); Modesto Irr. Dist. v. Tregea, 88 Cal. 334, 352, 26 Pac. 237 (1891); In re Madera Irr. Dist., 92 Cal.

required by the statute of the intention of such district to change such boundaries, and the owners of land attempted to be taken into such district have no notice of the change in boundaries and the inclusion of such land within the district, such owners are not prevented from challenging the legality of the change in the boundaries of such district until they have had their day in court. (Sullivan, C. J., dissenting in part.)

Appeal from the District Court of Canyon County.

Action by the Oregon Short Line Railroad Company against the Pioneer Irrigation District, its treasurer and ex officio tax collector of the irrigation district, to restrain collection of assessment. Appeal from judgment in favor of the defendants.

Attorneys for appellant—Rice, Thompson & Buckner.

Attorneys for respondent—P. L. Williams, D. Worth Clark, and W. A. Stone.

Sullivan, C. J., dissenting in part.

296, 307, 28 Pac. 272, 675, 27 Am. St. Rep. 106, 14 L. R. A. 755 (1891); Woodward v. Fruitvale Sanitary Dist., 99 Cal. 554, 562, 34 Pac. 239 (1893); Cullen v. Glendora Water Co., 113 Cal. 503, 45 Pac. 822, 1047 (1896). See 39 Pac. 769 (1895); In re Central Irr. Dist., 117 Cal. 382, 389, 49 Pac. 354 (1897); Escondido High School Dist. v. Escondido Seminary, 130 Cal. 128, 62 Pac. 401 (1900).

Nebraska.—See Board of Directors Alfalfa Irr. Dist. v. Collins, 46 Neb. 411, 417, 423, 64 N. W. 1086 (1895); State ex rel. Patterson v. Board of Commissioners, 47 Neb. 450, 66 N. W. 434 (1896).

Tennessee.—See Reelfoot Lake Levy Dist. v. Dawson, 97 Tenn. 179, 36 S. W. 1041 (1896).

Confirmation Act of March 16, 1889, held to be a separate and independent statute amendatory of the Wright Act, but no part thereof, provided special proceedings in which the aid of the court may be invoked to secure evidence and determine as to the due and regular organization of any irrigation district and the regularity of any bond issue by it and that the limitation of two years, provided in section 3 of the Wright Act of 1891, in which a suit shall be commenced or defense made attacking the validity of the organization, does not apply to special proceedings instituted by the board under the Act of 1889. In re Central Irr. Dist., 117 Cal. 382, 49 Pac. 354 (1897).

3. Colorado Statute.

The Colorado Irrigation District Law of 1901, p. 198, is not violative of the provision of the statute requiring all acts of the legislature to contain but one subject, which shall be clearly expressed in the title; or of the clause guarantying due process of law; or of the provision that waters of streams shall be the property of the public, subject to appropriation. Anderson v. Grand Valley Irr. Dist., 35 Colo. 525, 85 Pac. 313 (1906).

4. Idaho Statute.

The Idaho Irrigation District Law (Laws 1903, p. 150), providing for the creation and management of such districts is not violative of section 16 of article III of the State Constitution requiring all laws to embrace but one subject, which shall be clearly stated in its title, and does not in any other particular violate the State Constitution. Nampa & M. Irr. Dist. v. Brose, 11 Idaho 474, 83 Pac. 499 (1905).

5. Nebraska Statute.

The Nebraska Statute (Act March 26, 1895) providing for irrigation districts

STEWART, J. The Pioneer Irrigation District is an irrigation district organized on the —— day of July, 1901. The Oregon Short Line Railroad Company, a corporation, owns right of way and depot grounds within the boundary lines of said district. In the year 1905 the right of way and station grounds of the railroad company were assessed for the purpose of maintaining said irrigation district. The company prosecutes this suit to obtain a restraining order restraining said district and its treasurer from collecting taxes upon the right of way and station grounds of said company. The cause was tried to the court and a decree entered in favor of the railway company and in which the court adjudged: "That the defendant the Pioneer Irrigation District or its officers have no jurisdiction or authority to assess or levy any taxes upon any part of the property described in plaintiff's complaint, or the property herein described for the purpose of maintaining the said Pioneer

is copied in all essential respects from the California Wright Act, and is constitutional. Board of Directors of Alfalfa Irr. Dist. v. Collins, 46 Neb. 411, 64 N. W. 186 (1895). It is not unconstitutional either on the ground that the effect thereof is to confer legislative powers upon county boards or that the power thereby conferred upon the districts to levy taxes is without limitation. Board of Directors Alfalfa Irr. Dist. v. Collins, 46 Neb. 411, 64 N. W. 186 (1895).

6. Washington Statute.

The Washington Irrigation Law (Acts 1890, 1 Ballinger's Ann. Codes and Stats., § 4166) is almost identical with the California Statute known as the Wright Act, and is constitutional. Rothchild Bros. v. Rollinger, 32 Wash. 307, 73 Pac. 367 (1903).

D. Unconstitutional Acts.

An irrigation district law providing for the organization of such a district by a majority vote of the landowners within the district, and providing that the bonds and interest thereof issued by the district shall be paid by annual assessments on the property within the district, and on which land such bonds and interest are a lien, upon the organization of a district under the provisions of such law, becomes a contract within the provisions of the State Constitution (art. I, § 13) and of the Federal Constitution (§ 1, 14th Amendment) and a subsequent act of the legislature (Cal. Stats. 1893, p. 175) amendatory of the original act, authorizing the board of directors of the irrigation district, without the consent of the landowners within the district, to pledge the property of the district as security for bonds issued, is unconstitutional in that it impairs the obligation of a contract created by the organization of the district. Merchants' Nat. Bank v. Escondido Irr. Dist., 144 Cal. 329, 77 Pac. 937 (1904).

The legislature has no power to dispose absolutely of the property within an irrigation district, depriving the beneficiary owners thereof without due process of law, and for this reason an act of the legislature authorizing a conveyance of the statutory power to manage and control the water system and other properties of an irrigation district is in violation of the provision of the State Constitution (§ 13, art. XI) prohibiting the delegation of powers (Merchants Nat. Bank v. Escondido Irr. Dist., 144 Cal. 329, 77 Pac. 937—1904); and it was on this ground that the provisions of the Wright Act authorizing the board of directors of an irrigation district to pledge by mortgage, deed of trust, or otherwise, all the property of

Irrigation District." Then follows a description of the property. A motion for a new trial was made and overruled, and this appeal is from the judgment and from the order overruling the motion for a new trial.

The questions for determination and which are presented by the record are: First, is the plaintiff's right of way and station grounds such property as can be assessed for and subjected to the payment of a tax for the purpose of maintaining said district? Second, if such property is assessable, did the officers of the irrigation district, at the time of the organization thereof, comply with the law so as to be able thereafter to assess the property belonging to the railway company situated within said district? Third, if such property be assessable, and if the officers at the time of the organization of the district complied with the law, did they thereafter pursue the course pointed out by statute for the collection of such tax?

a district as additional security for the payment of its bonds, was held unconstitutional. Merchants' Nat. Bank v. Escondido Irr. Dist., 144 Cal. 329, 77 Pac. 937 (1904).

E. Construction of Statutes.

1. General Rule.

In California it is held that the provisions of a statute regulating the proceedings for the formation of an irrigation district and the management thereof after its formation are to be liberally construed so as to carry out the purpose of the law (Central Irr. Dist. v. De Lappe, 79 Cal. 351, 21 Pac. 825—1889); but in Colorado it is held that in as much as these statutes impose special burdens, they are to be strictly construed and in case of doubt are to be construed in favor of a taxpayer. Ahern v. Board of Directors of High Line Irr. Dist., 39 Colo. 409, 89 Pac. 963 (1907). In those cases where the statutes are in conflict, the later statute controls as being the last expression of the intention of the legislature relative to the subject. Fravert v. Mesa County Commissioners, 39 Colo. 71, 88 Pac. 873 (1907).

2. California Statute—Wright Act.

The provisions of the Wright Act (§§ 7, 30), making a tax deed to land sold in enforcement of an irrigation assessment conclusive evidence of the regularity of proceedings from the time of the levying of the assessment until the execution and delivery of the deed, are independent of the clause in the same act making such deed *prima facie* evidence as to the things which are therein enumerated; the former sections refer to proceedings other than those to which the deed is made merely *prima facie* evidence. Escondido High School Dist. v. Escondido Seminary, 130 Cal. 128, 62 Pac. 401 (1900).

The provision of the Wright Act (§ 37) requiring notice to be given to taxpayers of the meeting of the board of equalization is valid notwithstanding the fact that it does not provide that a notice shall be given of the final act of the board, which is the levying of the assessment, for the reason that this final act is a matter of record regarding which parties interested can ascertain the facts from the record. Lahman v. Hatch, 124 Cal. 1, 56 Pac. 621 (1899). Under the original provisions of the Wright Act (§ 38) the salaries of officers provided for therein were not an invalid indebtedness of the irrigation district, although in excess of the amount provided for in that act, and are not affected by amendments to that act, except indebtedness not exceeding two thousand dollars (Mitchell v. Patterson,

Counsel for respondent contend that the right of way and station grounds of the railway company are used strictly for railroad purposes and that water for the purpose of irrigation is not required and has never been used upon such grounds; and for that reason the district had no jurisdiction to assess such property. This argument of counsel is founded upon the claim that the power to assess as conferred by the irrigation law is based upon special benefits to the property assessed; and, inasmuch as the right of way and station grounds of the company cannot in any way be benefited by such improvement or the use of water, for that reason the district had no jurisdiction to make such assessment.

Section 2 of the act of March 6, 1899 (Laws 1899, p. 408), as amended by act of March 18, 1901 (Laws 1901, p. 191, § 1), provides for the organization of an irrigation district on presentation of a peti-

120 Cal. 286, 52 Pac. 589—1898). The question whether this limitation on the amount of indebtedness which an irrigation district may incur prohibits the incurring of an indebtedness for any purpose, including salaries of officers authorized by the act and essential for the transaction of business, was raised, but not decided, in Mitchell v. Patterson, 120 Cal. 286, 52 Pac. 589 (1898). See Welch v. Strother, 74 Cal. 413, 16 Pac. 22 (1887); Lewis v. Widber, 99 Cal. 412, 33 Pac. 1128 (1893); Hunt v. Broderick, 104 Cal. 313, 37 Pac. 1040 (1894); Rauch v. Chapman, 16 Wash. 568, 579, 48 Pac. 253, 58 Am. St. Rep. 52, 60 (1897).

3. Idaho Act.

The fact that the Idaho Statute (Laws 1899, p. 408, § 11, as amended by Laws 1901, p. 194) makes no provision for notice to the landowner that on a particular day the board of directors will assess benefits to the lands within the district will not render such statute unconstitutional where the statute does provide for notice to be given of the proceedings to organize such district and notice of the hearing for the confirmation of the organization and proceedings of such district, at which hearing the court is required to examine all the proceedings involved in the organization of such district, including the assessment of benefits. Oregon Short Line R. Co. v. Pioneer Irr. Dist., 16 Idaho, 578, 102 Pac. 904 (1909).

4. Confirmation Act.

The California Confirmation Act of 1889 (Stats. 1889, p. 212) has been held to be a separate and independent statute amendatory of the Wright Act, but forming no part thereof, and provides special proceedings in which the aid of the court may be invoked by an irrigation district to secure evidence and determine as to the due and regular organization of the district and the regularity and validity of any bond issue by it; the limitation of two years provided in section 3 of the Wright Act, as amended in 1891, for the commencement of actions and defenses made attacking the validity of the organization, has no application to the proceedings under said Confirmation Act. In re Central Irr. Dist., 117 Cal. 382, 49 Pac. 354 (1897).

F. De Facto Districts.

An irrigation district is a *quasi* public municipal corporation (see *post* I, II, 1, this note), and where an attempted organization of such a district fails to amount to a *de jure* municipal corporation, it may act as a corporation *de facto*, and its actions as such will be binding on everybody except the state, and any bonds issued by it will be valid.

tion. The petition is required to be accompanied with a map of the proposed district; this map is required to show the location of the proposed canal or other works by means of which it is intended to irrigate the proposed district. The statute provides that a hearing shall be had after notice, by the board of county commissioners, at which hearing the board may make such changes in the proposed boundaries as they may find proper and as are approved by the state engineer, and shall establish and define such boundaries provided, "That said board shall not modify said boundaries, so as to except from the operations of this act any territory within the boundaries of the district proposed by said petitioners, which is susceptible of irrigation by the same system of works applicable to other lands in such proposed district; nor shall any lands which will not in the judgment of said board be benefited by irriga-

United States.—Baltimore & P. R. Co. v. Fifth Baptist Church, 137 U. S. 568, 571, 34 L. Ed. 784, 11 Sup. Ct. 185 (1890); Shapleigh v. City of San Angelo, 167 U. S. 646, 655, 42 L. Ed. 310, 314, 17 Sup. Ct. 957 (1897); Tulare Irr. Dist. v. Shepard, 185 U. S. 1, 13, 46 L. Ed. 773, 22 Sup. Ct. 531 (1902); Miller v. Perris Irr. Dist., 85 Fed. 693 (1898), 99 Fed. 143 (1900); Herring v. Modesto Irr. Dist., 95 Fed. 705 (1899).

Alabama.—Snider's Sons Co. v. Troy, 91 Ala. 224, 8 So. 658, 24 Am. St. Rep. 887 (1890).

California.—People v. Montecito Water Co., 97 Cal. 276, 32 Pac. 236 (1893); Quint v. Hoffman, 103 Cal. 506, 37 Pac. 514 (1894).

Michigan.—Swartwout v. Michigan Air Line Co., 24 Mich. 389, 393 (1872).

New Jersey.—Stout v. Zulick, 48 N. J. L. (19 Vr.) 599, 7 Atl. 362 (1886).

New York.—Lamming v. Galusha, 81 Hun (N. Y.) 247, 30 N. Y. Supp. 767 (1894), affirmed in 151 N. Y. 648, 45 N. E. 1132 (1896).

Texas.—American Salt Co. v. Heidenheimer, 80 Tex. 344, 15 S. W. 1038 (1891). The legality of its organization cannot be collaterally attacked by an individual or pleaded by the district itself for the purpose of avoiding obligations which it has incurred while acting as such district. Herring v. Modesto Irr. Dist., 95 Fed. 705 (1899). See *post* III, J, 2 and IV, E, this note.

G. Public Use.

The irrigation of arid lands is a public purpose, and water put to such purpose is put to a public use.

United States.—In re Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. 56 (1869); Clark v. Nash, 198 U. S. 361, 49 L. Ed. 1085, 25 Sup. Ct. 676 (1905).

Arizona.—Orey v. Goodwin, 3 Ariz. 255, 26 Pac. 376 (1891).

California.—Crescent Canal Co. v. Montgomery, 143 Cal. 248, 76 Pac. 1032 (1894); San Joaquin & Kings River Canal & Irr. Co. v. Stanislaus Co., 155 Cal. 21, 99 Pac. 365 (1908).

Colorado.—Yonker v. Nichols, 1 Colo. 551 (1872); Schilling v. Rominger, 4 Colo. 100 (1878); De Graffenried v. Savage, 9 Colo. App. 131, 47 Pac. 902 (1897).

Montana.—Ellinghouse v. Taylor, 19 Mont. 462, 48 Pac. 757 (1897).

Nebraska.—Crawford Co. v. Hathaway, 67 Neb. 329, 93 N. W. 781, *sub nom.* Crawford Co. v. Hall, 60 L. R. A. 889 (1903—Laws 1893 p. 244); McCook Irr. & W. P. Co. v. Crews, 70 Neb. 115, 102 N. W. 249 (1905).

Utah.—Nash v. Clark, 27 Utah 158, 75 Pac. 371, 101 Am. St. Rep. 953, 1 L. R. A. (N. S.) 208 (1904), affirmed

tion by said system be included within such district." It will thus be seen from the provisions of this act that a final hearing is provided for after notice to all parties interested, at which the board may make such changes in the proposed boundaries as they may find proper, but shall not except any territory within the boundaries which is susceptible of irrigation by the same system of works applicable to other lands, or include within the boundaries of such district any lands which will not in the judgment of said board be benefited by irrigation by said system.

At the final hearing thus provided for the board of commissioners were necessarily required to determine whether or not the lands to be included within said district would be benefited by the system of irrigation proposed, and were precluded by the statute from including within the district any lands which would not in the judgment of the board

198 U. S. 361, 49 L. Ed. 1085, 25 Sup. Ct. 676 (1905).

Statutes providing that water appropriated for purposes of sale, rental or distribution should be public use, are valid. San Joaquin & Kings River Canal & Irr. Co. v. Stanislaus Co., 155 Cal. 21, 99 Pac. 365 (1908—Stats. 1885, p. 95); Crawford Co. v. Hathaway, 67 Neb. 325, 93 N. W. 781, *sub nom.* Crawford Co. v. Hall, 60 L. R. A. 889 (1903—Laws 1893, p. 244); McCook Irr. & W. P. Co. v. Crews, 70 Neb. 115, 102 N. W. 249 (1905). See San Diego Land & T. Co. v. National City, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. 804 (1899).

An irrigation district or an irrigation company is an agent of the state in the administration of the public use of water (Crescent Canal Co. v. Montgomery, 143 Cal. 248, 76 Pac. 1032, 65 L. R. A. 940—1904), and its officers are public officers or agents. See *post* I, H, 3, this note.

Appropriation of water to arid, or semi-arid lands is a public use which carries with it the power of eminent domain. See *post* I, I, this note.

H. Public Municipal Corporations.

1. Generally.

The ultimate purpose of the Irrigation Act is the improvement by irrigation of lands within the district. A district can, under the law, be organized and exist and acquire land for that purpose only. Jenison v. Redfield, 149 Cal. 500, 77 Pac. 62 (1906).

In an early Washington case it was said that irrigation districts are not municipal corporations (Middle Kittitas Irr. Dist. v. Peterson, 4 Wash. 147, 29 Pac. 995—1892), and the same has been held regarding ditch corporation formed under the Colorado Statute. Belnap Sav. Bank v. La Mar L. & C. Co., 28 Colo. 326, 339, 64 Pac. 212 (1901). But it is now generally held that irrigation districts, when organized under and in pursuance of the statute indicated by the legislature for the purpose of promoting the public welfare have all the elements of corporations formed to accomplish a public use or purpose, and are *quasi* public municipal corporations, as regards their functions, in the sense that the purposes for which they are organized are for the public benefit.

United States.—Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. 56 (1896); Tulare Irr. Dist. v. Shepard, 185 U. S. 1, 13, 46 L. Ed. 773, 22 Sup. Ct. 531 (1902); Stanislaus Co. v. San Joaquin & Kings River Canal & Irr. Co., 192 U. S. 201, 202, 48 L. Ed. 406, 24 Sup. Ct. 241 (1904); Herring v. Modesto Irr. Dist., 95 Fed. Rep. 705 (1899).

California.—Turlock Irr. Dist. v. Williams, 76 Cal. 360, 18 Pac. 379 (1888);

be benefited by irrigation by said system. The board of county commissioners was thus designated as the tribunal empowered to determine the question whether the lands included within the district would be benefited by the system proposed; and an opportunity was thus presented to the railway company to appear at such hearing and contest the question of benefits to the lands owned by the company within the district. The railway company did not appear at this hearing or make any objection to including within the district its right of way and station grounds; and not having appeared at the hearing provided by the statute for determining the question of benefits, the company is concluded by the judgment thus entered, in a collateral attack, and could only review such judgment in the method pointed out by the statute. Knowles v. New Sweden Irr. Dist., 16 Idaho 217, 101 Pac. 81; Board of Directors

Central Irr. Dist. v. De Lappe, 79 Cal. 351, 21 Pac. 825 (1889); Crall v. Poso Irr. Dist., 87 Cal. 140, 26 Pac. 797 (1890); In re Madera Irr. Dist., 92 Cal. 296, 28 Pac. 272, 675, 27 Am. St. Rep. 106, 14 L. R. A. 755 (1891); People v. Trunbull, 93 Cal. 630, 29 Pac. 224 (1892); People v. Selma Irr. Dist., 98 Cal. 206, 32 Pac. 1047 (1893); Quint v. Hoffman, 103 Cal. 506, 37 Pac. 514 (1894); Borhmer v. Big Rock Irr. Dist., 117 Cal. 19, 48 Pac. 908 (1897); Merchants' Nat. Bank v. Escondido Irr. Dist., 144 Cal. 329, 77 Pac. 937 (1904). See, also, Hagar v. Supervisors of Yolo County, 47 Cal. 222 (1874); Dean v. Davis, 51 Cal. 406 (1876); People v. Williams, 56 Cal. 647 (1880); People v. La Rue, 67 Cal. 526. 8 Pac. 84 (1885); Reclamation Dist. v. Hagar, 66 Cal. 54, 4 Pac. 945 (1884).

Nebraska.—Board of Directors of Alfalfa Irr. Dist. v. Collins, 46 Neb. 411, 64 N. W. 1086 (1895—Is a public rather than a municipal corporation); Lincoln & Dawson County Irr. Dist. v. McNeal, 60 Neb. 621, 83 N. W. 847 (1900).

New Mexico.—Candelaria v. Vallejos, 13 N. M. 146, 81 Pac. 589 (1905—Involuntary *quasi* public corporations).

The whole object of the legislation authorizing the organization of irrigation districts is to enable the owners of land susceptible of irrigation from a common source and by the same system of works, to form a district composed of such lands, which district when formed is a public corporation for the sole purpose of obtaining and distributing such water as may be necessary for the irrigation of the lands within the district, thus giving each owner for his lands within the district the benefit of the common system of irrigation, and bringing about the reclamation of the land of the district from aridity to a condition suitable for cultivation. Jenison v. Redfield, 149 Cal. 500, 87 Pac. 62 (1906).

While an irrigation district is a public municipal corporation as regards the function to be performed, it is not a municipal corporation to the extent that the state can dispose of its property as it pleases; but it is to be classed as a private corporation as regards the private right of the individual landowners within the district. Merchants' Nat. Bank v. Escondido Irr. Dist., 144 Cal. 329, 77 Pac. 937 (1904). The legal title to all of the lands of the district is held in trust by the district and is dedicated and set apart to the uses and purposes specified in the act. The beneficial title is in the owners of the land within the irrigation district. Tulare Irr. Dist. v. Collins, 154 Cal. 440, 442, 97 Pac. 1124 (1908). See Merchants' Nat. Bk. v. Escondido Irr. Dist., 144 Cal. 329, 77 Pac. 937 (1904).

v. Tregea, 88 Cal. 334, 26 Pac. 237; Fallbrook Irr. Dist. v. Bradley, 164 U S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369.

In the case of Knowles v. New Sweden Irr. Dist., 16 Idaho 217, 101 Pac. 81, this court had under consideration the question as to whether an irrigation district had jurisdiction to assess benefits to lands where the owner of such land was also the owner of a water right sufficient to irrigate said lands and adequate in every particular to satisfy the demands of such owner, in which opinion this court said: "The board of directors of the district had authority to determine whether or not plaintiff's land would be benefited by the organization of the district and the purchase of the irrigation system, and the only way appellant can call in question the action of the board as to the assessments made is the method provided by statute." The statement thus made in this opinion was in-

The trust being expressly limited in its terms, dedicating and devoting all lands owned by the district to the purposes of irrigation, there is no power in the trustees, as the law now stands, even to sell lands which by reason of a change in its plans have become unnecessary to the irrigation scheme. Tulare Irr. Dist. v. Collins, 154 Cal. 440, 442, 97 Pac. 1124 (1908). See San Francisco v. Itsell, 80 Cal. 57, 22 Pac. 74 (1889).

The Wright Act (Stats. 1887, p. 29) and the Bridgeford Act, amendatory thereof (Stats. 1897, p. 263) do not contemplate, or at least do not provide for, a situation where an irrigation district owns lands, which lands because of change in its plans have become unnecessary to the irrigation scheme. Tulare Irr. Dist. v. Collins, 154 Cal. 440, 442, 97 Pac. 1124 (1908).

2. Property Exempt from Execution.

Lands which by reason of change of plans have became unnecessary for the purposes of the irrigation district, in the absence in the statute of any provision for their disposition, remain impressed with the strict trust, the same as other lands in the district, and equally subject to assessment, and are exempt from execution, levy and sale. Tulare Irr. Dist. v. Collins, 154 Cal. 440, 442, 97 Pac. 1124 (1908). See San Francisco v. Le Roy, 138 U. S. 656, 34 L. Ed. 1097, 11 Sup. Ct. 364 (1891); Hart v. Burnett, 15 Cal. 530 (1860); Seale v. Doone, 17 Cal. 476, 484 (1861); Fulton v. Hanlow, 20 Cal 450, 480 (1862); Carlton v. Townsend, 28 Cal. 219 (1865); San Francisco v. Cannavan, 42 Cal. 541 (1872); Ames v. City of San Diego, 101 Cal. 390, 35 Pac. 1005 (1894).

The principle that the property of a *quasi* public corporation which is not necessary and employed in the exercise of the *quasi* public functions assumed, may be become subject to execution, does not apply to lands held by a public corporation, as an irrigation district, which lands are held under an express trust, when neither a sale of the land by the district nor any execution sale could be made without doing direct violation to the terms of the trust. The situation is identical with that of Pueblo lands. Tulare Irr. Dist. v. Collins, 154 Cal. 440, 443, 97 Pac. 1124 (1908).

The rule exempting property of *quasi* public corporations from execution, goes no further than to relieve from process such property as is necessary to the exercise of the *quasi* public functions which the corporation has assumed, and where such corporation abandons a portion of its franchise, so much of the property as was used in connection with the abandoned franchise may become subject to execution. Tulare Irr. Dist. v.

tended to refer to the action of the county commissioners in organizing the irrigation district, and not to the action of the board of directors, as under the statute the board of county commissioners are given power and jurisdiction to determine the question whether lands to be taken into a proposed irrigation district will be benefited or not. This question is determined when the district is organized. In this connection we may observe that the case of Knowles v. The New Sweden Irr. Dist. was governed by the provisions of the act of March 6, 1899; while the case under consideration is governed by the provisions of the amendatory act of March 18, 1901. Under the former act the assessment of benefits was not made prior to the hearing before the district court on confirmation of the proceedings of the organization of the district; while under the latter act, the assessment of benefits is made prior to the hearing

Collins, 154 Cal. 440, 443, 97 Pac. 1124 (1908). See Ames v. San Diego, 101 Cal. 390, 35 Pac. 1005 (1894); San Diego v. Linda Vista Irr. Dist., 108 Cal. 189, 41 Pac. 291 (1895); Witter v. Missions School Dist., 121 Cal. 350, 53 Pac. 905, 66 Am. St. Rep. 33 (1898); City Street Imp. Co., v. Regents of University of Cal., 153 Cal. 776, 96 Pac. 801 (1908).

The remissness of the directors in the discharge of their duty in failing to pay a judgment against the district under which the execution is issued, will not estop the district from insisting that its property is held under a public trust that shall be protected from illegal seizure and sale, to the end that this public trust may not be violated. Tulare Irr. Dist. v. Collins, 154 Cal. 440, 443, 97 Pac. 1124 (1908).

3. Officers of Are Public Officers.

Where an irrigation district is organized in pursuance of the laws providing for the organization of such districts its officers are public agents or officers of the state.

United States.—Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. 56 (1896).

California.—People v. Selma Irr. Dist. 98 Cal. 206, 208, 32 Pac. 1047 (1893); Quint v. Hoffman, 103 Cal. 506, 37 Pac. 514 (1894); Perry v. Oray Irr. Dist., 127 Cal. 565, 60 Pac. 40 (1900).

Nebraska.—Board of Directors of Alfalfa Irr. Dist. v. Collins, 46 Neb. 411, 64 N. W. 1086 (1895).

4. Powers of District.

As to the powers of an irrigation district and of the officers thereof, see *post* V, A and B, 2; VIII, A, this note.

I. Right of Eminent Domain.

1. Generally.

The application of water to arid and semi-arid lands being for the public welfare, is a public use (See I, G, this note) and irrigation districts being *quasi* public municipal corporations (See I, H, 1, this note) they have the right to exercise the power of eminent domain for the purpose of acquiring property to enable them to perfect and carry out the objects of their formation; and provisions necessary for the condemnation of lands and other property required for their purposes are usually incorporated in the statutes authorizing their formation.

United States.—Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. 56 (1896); San Diego L. & T. Co. v. National City, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. 804 (1899); Clark v. Nash, 198 U. S. 361, 49 L. Ed. 1085, 25 Sup. Ct. 676 (1905).

before the district court on confirmation, and by provisions of the statute is directly involved in such hearing.

After a re-examination of this question upon the argument in this case, we are fully satisfied that the conclusion of the court in the Knowles Case was correct, and that the owner of land within a proposed irrigation district cannot quietly sit by, fail to appear or file objections against the organization of an irrigation district and the inclusion of his lands therein, and afterwards, in a collateral attack, deny the jurisdiction of the district to assess such lands, upon the ground that such lands will not be benefited by the system of irrigation works proposed for such district. It no doubt was the intention of the legislature, in enacting the district irrigation law, that the boundaries of the district should be so adjusted as to include within the district only such lands as could be

Arizona.—Oury v. Goodwin, 3 Ariz. 255, 26 Pac. 376 (1891).

California.—Kelly v. Natoma Water Co., 6 Cal. 105 (1855); Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554 (1867); Lux v. Hagin, 69 Cal. 304, 10 Pac. 674 (1886); Turlock Irr. Dist. v. Williams, 76 Cal. 360, 18 Pac. 379 (1888), following Gilmer v. Limepoint, 18 Cal. 229, 552 (1861); In re Madera Irr. Dist., 92 Cal. 296, 309, 28 Pac. 272, 675, 27 Am. St. Rep. 106, 14 L. R. A. 755 (1891); Aliso Water Co. v. Baker, 95 Cal. 268, 30 Pac. 537 (1892); Lindsay Irr. Co. v. Mehrtens, 97 Cal. 676, 32 Pac. 802 (1893); Rialto Irr. Dist. v. Brandon, 103 Cal. 384, 37 Pac. 484 (1894); Emigrant Ditch Co. v. Webber, 108 Cal. 88, 40 Pac. 1061 (1895); Laguna Drainage Dist. v. Charles Martin Co., 144 Cal. 209, 77 Pac. 933 (1904); San Joaquin & Kings River C. & Irr. Co. v. Stanislaus County, 155 Cal. 21, 99 Pac. 365 (1908).

Colorado.—Yunker v. Nichols, 1 Colo. 551 (1872); Schilling v. Rominger, 4 Colo. 100 (1878); Coffing v. Left Hand Ditch Co., 6 Colo. 443 (1882); Tripp v. Overrocker, 7 Colo. 72, 1 Pac. 695 (1883); Golden Canal Co. v. Bright, 8 Colo. 144, 6 Pac. 142 (1885); Downing v. More, 12 Colo. 316, 20 Pac. 766 (1889); Saint v. Guerrerio, 17 Colo. 448, 30 Pac. 335, 31 Am. St. Rep. 320 (1892); San Luis Land C. & Imp. Co. v. Kenilworth Canal Co., 3 Colo. App. 244, 32 Pac. 860 (1893).

Idaho.—Portneuf Irr. Co. Limited v. Budge, 16 Idaho 116, 100 Pac. 1046 (1909); Knowles v. New Sweden Irr. Dist., 16 Idaho 217, 101 Pac. 81 (1908).

Montana.—Ellinghouse v. Taylor, 19 Mont. 462, 48 Pac. 757 (1897).

Nebraska.—Paxton & Hersey Irr. C. & L. Co. v. Farmers' & Merchants' Irr. & L. Co., 45 Neb. 884, 64 N. W. 343, 50 Am. St. Rep. 585, 29 L. R. A. 853 (1895); Board of Directors of Alfalfa Irr. Dist. v. Collins, 46 Neb. 411, 64 N. W. 1086 (1895).

Oregon.—Umatilla Irr. Co. v. Barnhart, 22 Or. 389, 30 Pac. 37 (1892).

Texas.—Maghee Irr. Ditch Co. v. Hudson, 85 Tex. 587, 22 S. W. 398 (1893).

Utah.—Nash v. Clark, 27 Utah 158, 75 Pac. 371, 101 Am. St. Rep. 953, 1 L. R. A. (N. S.) 208 (1904), affirmed 198 U. S. 361, 49 L. Ed. 1085, 25 Sup. Ct. 676 (1905).

Washington.—Lewis County v. Gordon, 20 Wash. 80, 54 Pac. 779 (1898—Dunbar, J., dissenting); Prescott Irr. Co. v. Flathers, 20 Wash. 454, 55 Pac. 635 (1899).

The use to which water and other property taken is to be put, being to satisfy a great public want or public exigency, makes it a public use within the meaning of the Constitution, and

irrigated from the system proposed, and would be more or less benefited by the construction or purchase of such system; but in fixing the boundaries of the district the statute does not limit the land, to be included therein, to lands which are being used for any particular purpose or to lands which require water for irrigation at the particular time the district is organized. The mere fact that the railroad company for the time being is using its lands for right of way and depot purposes is not a reason why such lands will not be benefited by a system of irrigation works controlled by the district or a reason why such lands should not be included within the boundaries of such district.

The question whether lands proposed to be incorporated within an irrigation district will be benefited has reference to the land in its natural state, and not to the use to which the land is being put at the time the

the state is not limited to any given mode of applying that property to satisfy the want or meet the exigeney. Turlock Irr. Dist. v. Williams, 76 Cal. 360, 18 Pac. 378 (1888), following Gilmer v. Limepoint, 18 Cal. 229, 252 (1861).

The language of section 12 of the Wright Act, authorizing the board of directors of an irrigation district to acquire property for the benefit of the district, is broad enough to include pipe lines, flumes or other conduits usually employed in works of irrigation, for conveying water, even if not necessarily included in the term "ditches and canals." Rialto Irr. Dist. v. Brandon, 103 Cal. 384, 37 Pac. 484 (1894).

2. Right of Way over Private Land.

An irrigation district is not required to resort to condemnation proceedings under the power of eminent domain, where it can contract satisfactorily with the owner for right of way; and is empowered to make contract for right of way, in consideration of which the owner is to have the privilege of purchasing water from the district for the purpose of irrigation; and where under such contract, water is supplied to the landowner for a term, but is afterwards withdrawn for the purpose of supplying it to others, mandamus will lie to compel the company to continue to supply water according to the contract. Merrill v. Southside Irr. Co., 112 Cal. 426, 44 Pac. 720 (1896).

See *post* VIII, B, 2, this note.

3 Right of Way over Public Land.

Where a right of way for an irrigation ditch, pipe line, etc., has not been acquired over public lands of the United States prior to their entry as a homestead, they cannot be subsequently acquired except by arrangement with the entryman or by taking proper proceedings to appropriate the land for that purpose (Rasmussen v. Blust, 82 Neb. 678, 120 N. W. 184—1908); and where an irrigation canal has been constructed through the public lands of the United States without securing the consent of the general government or taking a right of way by deed from the homestead entryman, and the entryman afterwards abandons the entry and allows it to revert to the general government, the irrigation district or proprietor of the canal will have no claim to the land over which it runs as against a subsequent entryman (Rasmussen v. Blust, 82 Neb. 678, 120 N. W. 184—1908); and the mere approval of a map and plans of a canal or ditch and reservoir subject to all existing vested rights, will not give a right as against a subsequent entryman who enters upon and occupies the lands under the pre-emption laws. Baldridge v. Leon

district is organized. We think this construction clearly appears from the language of the statute. In the very nature of things, an irrigation district must cover an extensive area of land, and if only land requiring the application of water, because of the use being made of it at the time the district is organized, can be included within the boundaries of the district, then it might be impossible to create such district out of contiguous territory; and the commissioners would be required to exclude from the boundaries of such district tracts of land which, although the same did not require water at the particular time of the organization of such district, yet upon the happening of some event would be placed in the same condition as other lands requiring water at the time of the organization of such district; and the boundaries of the district would necessarily include therein much land of irregular descriptions which

Lake D. & R. Co. (Colo. App.), 80 Pac. 477 (1905).

4. Complaint in Condemnation.

The procedure for condemnation, under power of eminent domain, of lands, etc., by an irrigation district for its uses, does not differ in the essential particulars from proceedings to condemn by any other public municipal corporation. The complaint or petition must state facts showing that the purpose for which the property is sought to be taken is a public use. Miocene Ditch Co. v. Lyng, 138 Fed. 544, 70 C. C. A. 458 (1905). See London v. Sample Lumber Co., 91 Ala. 606, 8 So. 281, 512 (1890); McCulley v. Cunningham, 96 Ala. 583, 11 So. 694 (1893); Evergreen Cemetery Assoc. v. Beecher, 53 Conn. 551, 5 Atl. 353 (1886); Farneman v. Mt. Pleasant Cemetery Assoc., 135 Ind. 344, 35 N. E. 271 (1893); Great Western N. G. & O. Co. v. Hawkins, 30 Ind. App. 557, 66 N. E. 765 (1903); New Orleans Terminal Co. v. Teller, 113 La. Ann. 733, 37 So. 624 (1904); In re New York Cent. & H. River R. Co., 5 Hun (N. Y.) 86 (1875); Valley R. Co. v. Bohm, 34 Ohio St. 114 (1877); Shick v. Pennsylvania R. Co., 1 Pears. (Pa.) 259 (1866); Wisconsin Water Co. v. Winans, 85 Wis. 26, 54 N. W. 103, 39 Am. St. Rep. 813, 20 L. R. A. 662 (1893); Compare Chicago & A. R. Co. v. City of Pontiac, 169 Ill. 155, 48 N. E. 485 (1897).

It is necessary in order to give the court jurisdiction that the complaint or petition should directly state that the taking of the land, etc., is necessary to such public use. See Sanford v. City of Tucson, 8 Ariz. 247, 71 Pac. 903 (1903); Contra Costa C. M. R. Co. v. Moss, 23 Cal. 323 (1863); Bennett v. City of Marion, 106 Iowa 628, 76 N. W. 844 (1898); Grand Rapids N. & L. S. R. Co. v. Van Driele, 24 Mich. 409 (1872); Flint & P. M. L. Co. v. Detroit & B. C. R. Co., 64 Mich. 350, 31 N. W. 281 (1887—"required" equal to the statutory "necessary"); City of Helena v. Harvey, 6 Mont. 114, 9 Pac. 903 (1886); In re Meagher, 35 Misc. (N. Y.) 601, 72 N. Y. Supp. 157 (1901); In re Union El. R. Co., 55 Hun (N. Y.) 611, 8 N. Y. Supp. 813 (1890); City of Dallas v. Hallock, 44 Or. 246, 75 Pac. 204 (1904); Fork Ridge Baptist Cemetery Assoc. v. Redd, 33 W. Va. 262, 10 S. E. 405 (1889).

A complaint in such an action showing the land is sought for the purpose of establishing and maintaining a ditch or pipe line or lines across the land sought to be condemned, which ditch and pipe lines are to be used in connection with an irrigating system, shows a public use (Rialto Irr. Dist. v. Brandon, 103 Cal. 384, 37 Pac. 484—1894), because in

would be excepted from the operation of the district irrigation law. We do not believe that this was intended by the statute, but, on the contrary, that the board of commissioners are authorized and empowered to incorporate within a proposed irrigation district such lands as in their natural state would be benefited from the system of works proposed. We are satisfied that by the enactment of the irrigation law under consideration the legislature intended to confer jurisdiction and power upon the board of county commissioners to include within the boundaries of an irrigation district all lands which in their natural state would be benefited by irrigation and are susceptible of irrigation by one system, regardless of the use to which any particular tract of land may be put at the time the district is organized; and although such use may be of such a character as to render such land unfit for cultivation, and make it unnecessary to apply water to such land to aid in the use to which the same is put.

such a proceedings the court will presume that, in the building of such a ditch or pipe line, the irrigation district or water company is acting for the purpose of serving the public. See Central Georgia R. Co. v. Union Springs & N. R. Co., 144 Ala. 639, 39 So. 473, 2 L. R. A. (N. S.) 144 (1900).

5. Condemning Specific Piece of Property—Determination.

It is not necessary in order to authorize an irrigation district to exercise the power of eminent domain that it should allege in its complaint or petition, or show on the hearing, that there is absolutely no other way than the one designated in the complaint by which water could be brought on its lands (Rialto Irr. Dist. v. Brandon, 103 Cal. 384, 37 Pac. 484—1894); because the question whether or not the district could construct its ditches or pipe lines on other property, so that there is no real necessity to acquire an easement on the designated property, is not open to investigation or determination. See St. Louis & S. F. R. Co. v. Southwestern T. & T. Co., 121 Fed. 276, 58 C. C. A. 198 (1903). But when the necessity of taking a specific piece of property for the use of the district is contested, it should be determined by the court *in limine* before appointing the commissioners to assess the damage that will be sustained by reason of the taking. Portneuf Irr. Co. Limited v. Budge, 16 Idaho 116, 100 Pac. 1046 (1909). See Hubbard v. Great Falls Mfg. Co., 80 Me. 39, 12 Atl. 878 (1888); St. Joseph Terminal R. Co. v. Hannibal & St. J. R. Co., 94 Mo. 535, 6 S. W. 691 (1887); Emerson v. Eldorado Ditch Co., 18 Mont. 247, 44 Pac. 969 (1896); In re City of New York, 22 App. Div. (N. Y.) 124, 47 N. Y. Supp. 965 (1897). As to necessary allegations in complaint or petition seeking condemnation of water or other property already appropriated to a public use, see *post* I, 1, 6, this note.

6. Condemnation of Appropriated Waters, etc.

The complaint or petition of an irrigation company seeking to condemn water, etc., already appropriated to a public use, must allege such facts as will show that the use for which the condemnation is sought is more necessary than the public use to which the property is at present applied, the question of the relative importance of the two uses being one for judicial determination (City of St. Helena v. Rogan, 26 Mont. 452, 68

It seems reasonable, and we believe we are justified in concluding, that although water may not be applied to a beneficial use upon a particular tract of land in an irrigation district, yet if a system of irrigation is provided by the district from which the lands of such district are irrigated and thereby benefited, it necessarily benefits all lands of the district, whether any particular tract may require or use thereon the water provided by such system. If this be true, then it would follow that although the right of way and station grounds of the railway company were not in a condition to have water applied to such lands in the use made of them at the time the district was organized, yet such lands would necessarily be benefited by reason of the fact that the application and use of the water from such system to other lands adjacent and surrounding the lands of the railroad company benefited such lands. The question

Pac. 798, 27 Mont. 135, 69 Pac. 709—1902); and the necessity will not be measured by the extent to which the use is actually applied, but rather to the public nature and character of the use to which it has been previously applied. Portneuf Irr. Co. Limited v. Budge, 16 Idaho 116, 100 Pac. 1046 (1909).

And where an irrigation district condemns a water right purchased by a landowner from a canal company, it does not thereby interfere with or interrupt the dedication already effected under the provisions of the Idaho Constitution (§ 4, art. XV); but the landowner will be required to pay such charges as may be established in conformity with law, for the use of the water. Knowles v. New Sweden Irr. Dist., 16 Idaho 217, 101 Pac. 81 (1908).

The necessity for the taking being shown, one irrigation canal company may condemn a part of the right of way of another irrigation canal company for the purpose of enlarging the old canal to sufficient capacity to carry such an additional volume of water as the needs of the latter company may require (Portneuf Irr. Co. Limited v. Budge, 16 Idaho 116, 100 Pac. 1046—1909); and all that the subjected irrigation company is entitled to under the act is that its property shall not be taken for public use without just compensation,—a fair return on the reasonable value of its property at the time it is being used for a public benefit. San Joaquin & Kings River Canal & Irr. Co. v. Stanislaus County, 155 Cal. 21, 99 Pac. 365 (1908). See San Diego Land & T. Co. v. National City, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. 804 (1899).

7. Jury Trial.

The method of procedure in proceedings by an irrigation district for condemnation of land, etc., is the same as similar proceedings by any other municipal or public corporation, and the parties to such proceedings by an irrigation district will be entitled to a jury trial wherever the parties would be entitled to such a trial on similar proceedings by any other municipal or public corporation. In Idaho the parties are, by statute, entitled to trial by jury. Portneuf Irr. Co. Limited v. Budge, 16 Idaho 116, 100 Pac. 1046 (1909).

8. Damages.

In condemnation by an irrigation district, the same as in condemnation by any municipal or public corporation, before the taking over of the property for public use, the damages must first be duly and regularly ascertained and assessed, and payment thereof made. See Portneuf Irr. Co. Limited v. Budge, 16 Idaho 116, 100 Pac. 1046 (1909).

of benefits, however, to the lands using water and the lands not requiring water is one merely of degree, and the extent of the benefits assessed to the lands of the district is a matter committed to the jurisdiction of the board of directors of such district.

In the case of Board of Directors v. Tregea, 88 Cal. 334, 26 Pac. 237, the Supreme Court of California had under consideration the district irrigation law of that state which, in the particulars involved in this case, is substantially the same as the irrigation law of this state, and in that case the court said: "The idea of a city or town is of course associated with the existence of streets, to a greater or less extent lined with shops and stores as well as dwelling houses, but it is also a notorious fact that in many of the towns and cities of California there are gardens and orchards inside the corporate boundaries, requiring irrigation. It

The fact that the Idaho Statute grants to a defendant in condemnation proceedings the right of a trial subsequent to the assessment of damages by the commissioners, and also the right of appeal, does not render the provision of the statute, authorizing the appointment of the commissioners and assessment of damages and the taking of possession after payment of the amount so assessed, obnoxious to the Constitution. Portneuf Irr. Co. Limited v. Budge, 16 Idaho 116, 100 Pac. 1046 (1909).

Where damages have been assessed in condemnation proceedings pursuant to section 5221 of Idaho Revised Codes, as of the date of the issue of the summons, and the damages so assessed are paid to the landowners, the fact that the plaintiff in condemnation may subsequently commit waste or damage on the lands so condemned and may not prosecute the preceedings to final judgment, can in no way prejudice the landowner whose damages are assessed as of a previous date. Portneuf Irr. Co. Limited v. Budge, 16 Idaho 116, 100 Pac. 1046 (1909).

J. Interest and Property in the Water.

An irrigation district, being a *quasi* public municipal corporation, holds for the public benefit all interests and rights with which it is vested; no proprietary interest vests in the district in the legal sense of that term. In districts organized under the California Irrigation District Laws the legal title vests in the district in trust only for the landowners as beneficiaries, the rights of such landowners are private rights within the protection of section 13 of article I of the State Constitution and section 1 of the 14th Amendment to the Constitution of the United States, and the state legislature has no power to dispose absolutely of the property, depriving the beneficiary owners thereof without due process of law. Merchants' Nat. Bank v. Escondido Irr. Dist., 144 Cal. 329, 77 Pac. 937 (1904).

The New Mexico statute does not confer upon the officers, or a majority interested in a ditch thereby incorporated, the power to change the ancient course of a stream against the consent of the owners who would be injuriously affected thereby. Candelaria v. Vallejos, 13 N. M. 146, 81 Pac. 589 (1905).

The Oregon Irrigation District Law (Laws 1895, p. 19) merely authorizes the organization of public corporation for the purpose of acquiring and owning irrigation ditches, canals, reservoirs, works and water rights, and distributing water to the settlers within the boundaries of the district; and the authority vested in the board of directors to make

is equally notorious that in many districts lying outside of the corporate limits of any city or town, there are not only roads and highways, but dwelling houses, outhouses, warehouses, and shops. With respect to those things which determine the usefulness of irrigation there is only a difference of degree between town and country. * * * It being equally clear and notorious as matter of fact that there are cities and towns which not only may be benefited by irrigation, but actually have in profitable use extensive systems for irrigating lands within their corporate limits, it cannot be denied that the supervisors of Stanislaus County had the power to determine that the lands comprising the City of Modesto would be benefited by irrigation, and might be included in an irrigation district. * * * In the nature of things, an irrigation district must cover an extensive tract of land, and, no matter how purely rural and agricultural the community may be, there must exist here and there

necessary and needed by-laws for the distribution of water to all the lands, and to do other lawful acts necessary to be done in order that sufficient water may be furnished to each landowner, is for the purpose of carrying out the powers granted to the corporation, and does not vest the district with supervision or control over the rights of the individuals; it cannot settle disputes between individuals, nor can it regulate or control water rights belonging to private persons; and it has no such interest in the waters of the district as entitles its officers to maintain a suit in equity to have determined the respective rights of landowners in the distribution to the waters under the system. Little Walla Walla Irr. Dist. v. Preston, 46 Or. 5, 78 Pac. 982 (1904).

In an irrigation district organized under the Utah Statute (Laws 1884, p. 127) the parties owning land under the system of canals of such district, who have an interest in and are entitled to the water of such canals, become members of the district as tenants in common of its property, and neither the district nor its trustees can thereafter transfer any of the interests of such landholders within or under its jurisdiction. Thompson v. McFarland, 29 Utah 455, 82 Pac. 478 (1905).

K. Bankruptcy and Dissolution.

An irrigation district being a *quasi* public municipal corporation engaged in administrating the public use of supplying water for irrigation purposes, is not subject to be adjudged an involuntary bankrupt under the Federal Bankruptcy Law. In re Bay City Bank Co., 135 Fed. 850 (1905).

As to method of procedure against an irrigation district refusing or neglecting to pay judgment procured against it see *post* VI, K, and VIII, C, 2, this note.

An irrigation district cannot be dissolved for misuser or nonuser of its corporate powers, in the absence of express provisions conferring that power upon the courts. People v. Selma Irr. Dist., 98 Cal. 206, 208, 32 Pac. 1047 (1893); Quint v. Hoffman, 103 Cal. 506, 37 Pac. 514 (1894).

Where an irrigation district which had been organized under the Utah Statute (Laws 1884, p. 127) had secured an order from the court restraining interference with the ditches belonging to the district, was thereafter dissolved under the provisions of the statute, the restraining order thereupon became *functus officio*, and persons theretofore restrained, upon such dissolution, were remitted to their original right as individual landowners. Thompson v. Mc-

within its limits a shop or warehouse covering a limited extent of ground that can derive no direct benefit from the use of water for irrigation. Here, again, the difference between town and country is one of degree only, and a decision in the interest of shopowners in towns that their lots cannot be included in an irrigation district would necessarily cover the case of the owner of similar property outside of a town. It is nowhere contended by the appellant that in organizing irrigation districts it is the duty of the supervisors to exclude by demarcation every minute tract or parcel of land that happens to be covered by a building or other structure which unfits it for cultivation, and certainly the law could not be so construed without disregarding many of its express provisions, and at the same time rendering it practically inoperative. We construe the law to mean that the board may include in the boundaries of the

Farland, 29 Utah 455, 82 Pac. 478 (1905).

II. Proceedings for Organization.

A. In General.

The proceeding for the organization of an irrigation district is purely statutory, and the method prescribed in the statute must be strictly pursued and complied with. Gutierres v. Albuquerque L. & Irr. Co., 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. 338 (1903); Ahern v. Board of Directors of High Line Irr. Dist., 39 Colo. 409, 89 Pac. 963 (1907); Nampa & M. Irr. Dist. v. Brose, 11 Idaho 474, 83 Pac. 499 (1905); Settlers' Irr. Dist. v. Settlers' Canal Co., 14 Idaho 504, 94 Pac. 829 (1908). See Central Irr. Dist. v. De Lappe, 79 Cal. 351, 21 Pac. 797 (1890); Modesto Irr. Dist. v. Tregea, 88 Cal. 334, 26 Pac. 237 (1891); affirmed in 164 U. S. 179, 41 L. Ed. 395 (1896); Cullen v. Glendora Water Co., 113 Cal. 503, 512, 45 Pac. 822, 1047—1896 (see 39 Pac. 769—1895); In re Central Irr. Dist., 117 Cal. 382, 397, 49 Pac. 354 (1897); Crippin v. X. Y. Irr. Ditch Co., 32 Colo. 447, 76 Pac. 794 (1904); Pioneer Irr. Dist. v. Campbell, 10 Idaho 159, 77 Pac. 328 (1904); Little Walla Walla Irr. Dist. v. Preston, 46 Or. 5, 78 Pac. 982 (1904); Ryan v. Tutty, 13 Wyo. 122, 78 Pac. 661 (1904). But the statutes prescribing the manner in which an irrigation district may be formed are to be liberally construed to carry out the purpose of the law. Central Irr. Dist. v. De Lappe, 79 Cal. 351, 21 Pac. 825 (1889). See *ante* I, E, 1, this note.

The irrigation district laws provide, as the first step in the organization, a petition signed by landowners within the proposed district. The qualification of signers and the number of signers required varies, dependent, in some states, as in Idaho, on the sparsity or density of the population in the proposed district (see *post* II, B, 3, this note). The action of the board to which the petition is presented must be confirmed by a vote of the electors within the proposed district signifying assent to the organization by a majority vote. See *post* II, B, 8, this note.

There is nothing in the statute prescribing the form of a petition for the formation of an irrigation district. Fogg v. Perris Irr. Dist., 154 Cal. 209, 213, 97 Pac. 316 (1908).

The proceedings for the organization of an irrigation district are entirely separate and distinct from the proceedings for the confirmation of the district after its organization. People v. Perris Irr. Dist., 142 Cal. 601, 76 Pac. 381 (1904). See *post* III, this note.

B. Petition.

1. Generally.

The petition for the organization of

district all lands which in their natural state would be benefited by irrigation and are susceptible of irrigation by one system, regardless of the fact that buildings or other structures may have been erected here and there upon small lots, which are thereby rendered unfit for cultivation, at the same time that their value for other purposes may have been greatly enhanced."

In the case of Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369, the Supreme Court of the United States, after quoting the above extract from Modesto Irr. Dist. v. Tregea, and also having under review the district irrigation law of California, says: "The legislature not having itself described the district has not decided that any particular land would or could possibly be benefited as described, and therefore it would be necessary to give a hearing at some time to

an irrigation district must be signed by the number of persons designated in the statute, and the signers must have the qualifications prescribed therein; but after the organization of a district has been perfected and that organization has been confirmed by judgment and decree of the court, irregularities in the petition for organization in that it was not signed by bona fide freeholders as required by the statute, do not render the proceedings void after such confirmation, the purpose of the Irrigation Laws (Cal. Stats. 1889, p. 212) being to furnish a barrier against attack on the ground of fraud after confirmation proceedings had. Fogg v. Perris Irr. Dist., 154 Cal. 209, 97 Pac. 316 (1908).

The petition for the organization of a district, when properly drawn and duly signed and published, may perform the double office of petition and notice under the statute, where there is nothing in the statute forbidding such double function. Fogg v. Perris Irr. Dist., 154 Cal. 209, 97 Pac. 316 (1908).

2. Boundaries.

a. Generally.

The various statutes providing for the organization of irrigation districts provide that the petition for such organization shall set forth and particularly describe the boundaries of the proposed district. Central Irr. Dist. v. De Lappe, 79 Cal. 351, 21 Pac. 825 (1889); Oregon Short Line R. Co. v. Pioneer Irr. Dist. (Idaho, May 26, 1909), 102 Pac. 904.

Under some of the statutes it is held that this provision as to boundaries requires a description by metes and bounds, for the reason that the "boundaries" are the things which are to be described, and not merely the district; but that a description by metes and bounds which would be sufficient in an ordinary deed, or an act of the legislature creating a political district or municipal corporation, is sufficient. Central Irr. Dist. v. De Lappe, 79 Cal. 351, 21 Pac. 825 (1889); In re Madera Irr. Dist., 92 Cal. 296, 28 Pac. 272, 675, 27 Am. St. Rep. 106, 14 L. R. A. 755, (1891); Oregon Short Line R. Co. v. Pioneer Irr. Dist., 16 Idaho 578, 102 Pac. 904 (1909).

It is not necessary that a specific and accurate description of each tract, or legal subdivision of land within the district should be given under Idaho Laws 1899, p. 408, § 2, as amended by Laws 1901, p. 191, § 1. Oregon Short Line R. Co. v. Pioneer Irr. Dist., 16 Idaho 578, 102 Pac. 904 (1909). In such description plain monuments control courses and distances, false courses may be rejected and lines may be supplied by intendment; parol evidence is admissible to aid in locating the course

those interested upon the question of fact whether or not the land of any owner which was intended to be included would be benefited by the irrigation proposed. If such a hearing were provided for by the act, the decision of the tribunal thereby created would be sufficient. Whether it is provided for will be discussed when we come to the question of the proper construction of the act itself. If land which can, to a certain extent, be beneficially used without artificial irrigation, may yet be so much improved by it that it will be thereby and for its original use substantially benefited, and, in addition to the former use, though not in exclusion of it, if it can then be put to other and more remunerative uses, we think it erroneous to say that the furnishing of artificial irrigation to that kind of land cannot be, in a legal sense, a public improvement, or the use of the water a public use. Assuming, for the purpose

of lines. (Central Irr. Dist. v. De Lappe, 79 Cal. 351, 21 Pac. 825 — 1889); if the landmarks called for are definite, they will be sufficient in the absence of evidence that such landmarks cannot be found upon the ground. Cullen v. Glendora Water Co., 113 Cal. 503, 512, 45 Pac. 822, 1047 (1896). See 39 Pac. 769 (1895). Where it does not appear that the boundaries as set forth in the petition are so indefinite that the district cannot be definitely located, or that the boundaries as set forth fail to embrace a definite and distinct territory the board to which the petition is submitted acquires jurisdiction therefrom to authorize an organization of the district. In re Madera Irr. Dist., 92 Cal. 296, 28 Pac. 272, 675, 27 Am. St. Rep. 106, 14 L. R. A. 755 (1891).

b. Modification of.

The board to which the petition for the organization of an irrigation district is submitted has power, upon the final hearing, to modify the boundaries of the district so as to exclude lands therefrom or to include lands therein not included by the petition, where proper application has been made therefor by the owner of such land. See People v. Hagar, 66 Cal. 59, 4 Pac. 951 (1884); People ex rel. Bettner v. Riverside, 70 Cal. 461 (1886). But a proper notice thereof must be duly given to the parties to be affected thereby. Oregon Short Line R. Co. v. Pioneer Irr. Dist., 16 Idaho 578, 102 Pac. 904 (1909). But in so doing the board may not exempt any territory described in the petition which is susceptible of being irrigated by the same system of works applicable to the other lands in the district; and where lands have been excluded by the board, such exclusion may be reviewed in special proceedings to determine the validity of the organization of the district. Ahern v. Board of Directors of High Line Irr. Dist., 39 Colo. 409, 89 Pac. 963 (1907). And the action of the board in this regard, as to lands which are embraced within the boundaries of a district as set forth in the petition or modified by such board, which are susceptible of irrigation, is final so far as the validity of the organization of the district is concerned. See People v. Hagar, 66 Cal. 59, 4 Pac. 951 (1884); People ex rel. Bettner v. Riverside, 70 Cal. 461 (1886); Modesto Irr. Dist. v. Tregea, 88 Cal. 334, 26 Pac. 237 (1891). In Idaho and Nebraska, however, the statute makes special provisions whereby lands within the proposed district which are susceptible of irrigation may be exempted from the obligations imposed on landholders by the organization of the district in those cases where the exceptions in the statutes provided ob-

of this objection, that the owner of these lands had by the provisions of the act, and before the lands were finally included in the district, an opportunity to be heard before a proper tribunal upon the question of benefits, we are of opinion that the decision of such a tribunal, in the absence of actual fraud and bad faith, would be, so far as this court is concerned, conclusive upon that question."

If then the railroad company was given an opportunity to be heard in accordance with the provisions of the statute upon the question of including the lands of the company within the district, and whether such lands were benefited by reason of the system of irrigation, and made no objection or protest thereto, but submitted to the action of the tribunal authorized by the statute to determine such matter, then, as said by the Supreme Court of the United States, in the absence of actual fraud

tain. See *post* II, C, I, and 3, a, e and d.

3. Signers.

a. Generally.

A petition for the organization of an irrigation district under the Wright Act is not sufficient if not signed by fifty freeholders owning land within the district, and proceedings for confirmation of the organization cannot be maintained (Directors of Fallbrook Irr. Dist. v. Abila, 106 Cal. 355, 39 Pac. 794—1895); but under the Washington Statute (Act 1890, 1 Ballinger's Ann. Codes and Stats., § 4166), providing that whenever "fifty or a majority of the holders of title or of evidence of title to lands within the proposed district susceptible of irrigation from a common source and by the same system of works" sign a petition requesting the organization of a district, proceedings may be had for the organization of an irrigation district under the provisions of the act, where said petition is signed by less than fifty holders of title or evidence of title, but who constitute a majority of the landowners of the district, this will constitute sufficient signatures, under the statute, to authorize the organization of the district (Rothchild Bros. v. Rollinger, 32 Wash. 307, 73 Pac. 367—1903); because the intention of the legislature is held to have been that fifty signatures should be appended to the petition in thickly settled districts, but in sparsely settled territory, a majority of the landowners within the proposed district, although such majority does not constitute the number of fifty persons, should be sufficient to give the board jurisdiction to organize the district. Rothchild Bros. v. Rollinger, 32 Wash. 307, 73 Pac. 367 (1903). See Board of Directors of Middle Kittitas Irr. Dist. v. Peterson, 4 Wash. 147, 29 Pac. 995 (1892); State ex rel. Witherop v. Brown, 19 Wash. 383, 53 Pac. 548 (1898); Kincade v. Witherop, 29 Wash. 10, 69 Pac. 399 (1902). See *post* III, I, 1, this note. It would seem that in California it is not necessary that the signatures be appended to the petition if they are filed with the petition and bond required, at the same time the petition is filed. See Central Irr. Dist. v. De Lappe, 79 Cal. 351, 21 Pac. 825 (1889).

b. "Owners" Construed.

The word "owners," as used in the Wright Act and other acts regulating the formation of irrigation districts, requiring that the petition shall be signed by the "owners" of land within the district, is to be given its general and unrestricted meaning, and imports one who has full proprietorship in and dominion over the property (Directors of Fallbrook Irr. Dist. v. Abila, 106 Cal.

or bad faith such action would be conclusive upon that question. Counsel for respondent, however, argue that the railroad company had no notice of the intention to include its lands within the district or of the hearing to assess benefits, for the reason that its right of way and station grounds were not described in the petition or in any of the proceedings leading up to and including the time the assessment of benefits was made. A reference, however, to the statute (section 1, Laws 1901, p. 191) discloses that the petition for the organization of an irrigation district is not required to specifically describe each tract or legal subdivision within the proposed district. The statute only requires the petition to describe the proposed boundaries. Neither does the statute require that the notice, stating the time of the meeting at which the petition will be presented, nor the notice of the time of the hearing of the

355, 39 Pac. 794—1895); and only persons who are bona fide holders of agricultural lands are qualified to sign the petition for the organization of the district. In re Central Irr. Dist., 117 Cal. 382, 397, 49 Pac. 354 (1897). The Oregon Irrigation District Law (Laws 1895, p. 19) requires that the petition shall be signed by actual settlers on land susceptible of irrigation from a common source through the same system of works. Little Walla Walla Irr. Dist. v. Preston, 46 Or. 5, 78 Pac. 982 (1904).

c. "Dummy" Owners.

In a case where the required number of freeholders within the district could not be obtained to a petition for organization, and resident landowners wishing to form the district conveyed small tracts of their land, without consideration, to other persons so as to qualify them to sign the petition as freeholders, under an arrangement whereby they were to take the title, sign the petition as freeholders, and after the organization of a district to reconvey the lands,—this was held to constitute a fraud upon the law, and that a decree confirming the organization of such district could be set aside in equity. People v. Perris Irr. Dist., 142 Cal. 601, 76 Pac. 381 (1904). Such a procedure constitutes a fraud on the board, if concealed from it, or would be a fraud upon the law and the property owners of the district, even if disclosed to the board, and where shown to a court on proceedings for confirmation, it would be sufficient cause for declaring the organization of the district invalid. People v. Perris Irr. Dist., 142 Cal. 601, 76 Pac. 381 (1904); Fogg v. Perris Irr. Dist., 154 Cal. 209, 214, 97 Pac. 316 (1908). Such fraud, however, does not make the organization of the district void, but voidable only. Fogg v. Perris Irr. Dist., 154 Cal. 209, 214, 97 Pac. 316 (1908).

d. Owners of City Lots.

It is shown elsewhere in this note that incorporated towns and villages may be included within an irrigation district where they will be benefited thereby (see *post* II, C, 2, e); and that the owners of small residence lots in such towns and villages within a proposed irrigation district are "landowners" within the meaning of the Wright Act, so as to make them qualified signers of an original petition for the organization of an irrigation district, seems to have been held in the case of Directors of Modesto Irr. Dist. v. Tregea, 88 Cal. 334, 26 Pac. 237; but that question was expressly reserved and not decided in a later case, the court saying that the case of Board of Directors of Modesto Irr. Dist. v. Tregea, is not to be taken as an absolute adjudication on the point (Directors of

same, shall contain a description of the different tracts of land or legal subdivisions within the boundaries of the proposed district. The notice therefore given to the railroad company was the same notice given to every other landowner within such proposed district, and, as held by this court in the Knowles Case, was sufficient to require the railroad company to appear, and in case of failure to do so to conclude it by the action of the commissioners in organizing said district. See, also, Eagleson v. Rubin, 16 Idaho 92, 100 Pac. 765.

Section 11 of the act under consideration requires the board to examine all tracts and legal subdivisions within the boundaries of the district and apportion the benefits according to their judgment. This provision means that the board shall examine all the lands within the district and determine the benefit to each particular legal subdivision or tract.

Fallbrook Irr. Dist. v. Abila, 106 Cal. 355, 39 Pac. 794—1895); and in the case of In re Central Irr. Dist. 117 Cal. 382, 49 Pac. 354 (1897), it is expressly held that the owners of such lots are not such owners of land as are qualified to sign a petition for the organization of a district within the meaning of the Wright Act.

e. Tenants in Common.

The question whether or not a tenant in common is to be considered as an owner of land within the provision of the Wright Act was especially reserved and not decided by the Supreme Court of California, the court saying, however, that if one tenant in common can overrule all his cotenants, or if a large number of tenants in common of one tract are each individually qualified signers of an original petition for the organization of an irrigation district, many conflicts might arise under which much injury would come to the landowners. Directors of Fallbrook Irr. Dist. v. Abila, 106 Cal. 355, 39 Pac. 794 (1895). See Mulligan v. Smith, 59 Cal. 206 (1881); Pfeiffer v. Regents of the University, 74 Cal. 156, 15 Pac. 622 (1887).

f. Married Women.

A married woman in whose name a deed to land is taken in a purchase, for a money consideration, made prior to the amendment of 1889 to section 164 of the California Civil Code, in the absence of evidence to show that the property was purchased with her private funds, is not a competent signer of an original petition for the organization of an irrigation district. Directors of Fallbrook Irr. Dist. v. Abila, 106 Cal. 355, 39 Pac. 794 (1895).

g. Purchasers of Railroad Lands.

Where a proposed irrigation district embraces within the boundaries described public lands donated to a railroad company, but to which lands no patent has yet been issued by the government, the question whether bona fide purchasers of such lands from the railroad company by persons who are citizens of the United States and to whom deeds have been made for the parcels of land thus purchased, are "owners of land" within the meaning of the Wright Act, was raised, but not decided, in Cullen v. Glendora Water Co., 113 Cal. 503, 512, 45 Pac. 822, 1047 (1896). See 39 Pac. 769 (1895).

h. Purchasers of School Lands.

A purchaser of school lands from the state who merely holds such lands on a certificate of purchase having paid but twenty per cent. of the purchase price of the lands so bought, is not a "freeholder owning land" within a proposed irriga-

If an entire legal subdivision be equally benefited, then all that is necessary is to designate the benefit to the legal subdivision. If, however, a portion of a legal subdivision designated as a tract be benefited differently from the remainder of such legal subdivision, then the board is required to designate the benefit of the particular tract. The benefits thus fixed and determined by the board are laid against the land and not against each individual owner thereof. The entire proceeding for the determination of benefits is a proceeding in rem against the land, and all that the statute requires is that the board shall designate the benefit to the particular legal subdivisions or tracts within the proposed district. The benefit thus determined has reference to the land and not to the ownership of the land. It is fixed and determined with reference to the land and not with reference to the quantity or description of the land owned

tion district, within the meaning of the Wright Act, and not a qualified signer of an original petition for the organization of an irrigation district. Directors of Fallbrook Irr. Dist. v. Abila, 106 Cal. 355, 39 Pac. 794 (1895).

4. Bond.

a. Defective.

Where the bond required by statute to be filed with the petition for the organization of an irrigation district is defective, the board of supervisors has power to allow a new bond to be filed, and may continue the hearing of the petition for that purpose; and where such proceedings are had, and a new bond is filed, the new bond "accompanies the petition," within the meaning of the statute. Central Irr. Dist. v. De Lappe, 79 Cal. 351, 21 Pac. 825 (1889).

A bond accompanying the petition being defective in form is not for that reason invalid, and it binds those who sign it; the determination of the sufficiency of the bond rests entirely with the board of supervisors, and their determination in that regard is conclusive. In re Madera Irr. Dist., 92 Cal. 296, 28 Pac. 272, 675, 27 Am. St. Rep. 106, 14 L. R. A. 755 (1891).

Where the organization bond recites as petitioners the names of two persons who did not in fact sign the petition, but whose names are filed with the petition, and the bond is filed at the same time the petition is filed, such reference in the bond is sufficient for the purposes of identification. Central Irr. Dist. v. De Lappe, 79 Cal. 351, 21 Pac. 825 (1889).

b. Conditions of.

The bond to be filed with the petition for the organization of an irrigation district is required by the statute to be conditioned to pay the costs "in case said organization shall not be affected"; but this requirement is satisfied by a bond which is conditioned that it should be void "if said obligors or bondsmen shall pay all the costs," etc., because such a bond is broader than that required by the statute and includes all the requisite provisions of the statutory bond. In re Central Irr. Dist., 117 Cal. 382, 397, 49 Pac. 354 (1897).

5. Publication of Petition.

The statutes regulating the formation of irrigation districts generally require that the petition for the organization of the district shall be published. See Central Irr. Dist. v. De Lappe, 79 Cal. 351, 21 Pac. 825 (1889); Cullen v. Glendora Water Co., 113 Cal. 503, 45 Pac. 822, 1047 (1896), see 39 Pac. 769 (1895). Ahern v. Board of Directors of High Line Irr. Dist., 39 Colo. 409, 89 Pac.

by any particular individual or corporation. In assessing such benefits the record shows the board of directors made the following order: "Order assessing benefits and costs of apportionment: The board of directors having complied with the law requiring an examination of each tract and legal subdivision of land within the boundaries of the Pioneer Irrigation District, for the purpose of determining the benefits to be derived by each such tract and legal subdivision from the proposed irrigation system and being fully advised in the premises, do hereby adjudge and order that the benefits accruing to all lands within the district from such irrigation system shall be equal, and the apportionment of costs of the proposed works is fixed at $6.00 per acre except as hereinafter otherwise provided; provided, that in view of the additional cost of distribution growing out of the extra expense in the

963 (1907); Portneuf Irr. Co. Limited v. Budge, 16 Idaho 116, 100 Pac. 1046 (1909); Knowles v. New Sweden Irr. Dist., 16 Idaho 217, 101 Pac. 81 (1908).

In the publication of the petition under such statutes, slight mistakes in the spelling of some of the names signed to the petition for the formation of the district, which are entirely unimportant, and defects in the description of the district, do not affect the validity of the proceedings. Central Irr. Dist. v. De Lappe, 79 Cal. 351, 21 Pac. 825 (1889).

A description in the petition for the organization of the district will be sufficient if the landmarks called for are definite, in the absence of evidence that such landmarks cannot be found upon the ground. Cullen v. Glendora Water Co., 113 Cal. 503, 512, 45 Pac. 822, 1047 (1896). See 39 Pac. 769 (1895). See *ante* II, B, 2, this note.

6. Notice.

a. Generally.

In the organization of irrigation districts, the statutes prescribe the procedure which must be complied with, and among other things require that notice of the meeting of the board at which the petition will be presented shall be given. See In re Central Irr. Dist., 117 Cal. 382, 49 Pac. 354 (1897). Ahern v. Board of Directors of High Line Irr. Dist., 39 Colo. 409, 89 Pac. 963 (1907); Portneuf Irr. Co. Limited v. Budge, 16 Idaho 116, 100 Pac. 1046 (1909). This requirement is mandatory, and such publication is an essential prerequisite to conferring jurisdiction upon the board of supervisors to act in the matter, and such notice must conform to the statutory requirements (In re Central Irr. Dist., 117 Cal. 382, 49 Pac. 354—1897); must be signed by the petitioners, and must be so definite as not to be misleading. In re Central Irr. Dist., 117 Cal. 382, 49 Pac. 354 (1897); Ahern v. Board of Directors of High Line Irr. Dist., 39 Colo. 409, 89 Pac. 963 (1907).

The notice and petition for the formation of an irrigation district may be embodied in one document. There is nothing in the statute forbidding such a combination of uses, or prescribing any particular form either for the petition or the notice. Fogg v. Perris Irr. Dist., 154 Cal. 209, 213, 97 Pac. 316 (1908).

b. By Petitioners.

The notice required to be given of the meeting of the board at which the petition for the organization of an irrigation district is to be presented must be given and published by the petitioners themselves, it not being within the power of the board of supervisors to cause the same to be published; and such notice

construction of laterals and so on and the advantage derived in many ways, the costs assessed against the lots within any incorporated town or village within the irrigation district is hereby fixed at the rate of two dollars per lot 25 by 120 feet or fraction thereof, and where in any portion of such incorporated town or village the lots shall be of a larger size the costs assessed against them shall be in the same proportion. It is ordered that the secretary be and hereby is authorized to prepare such maps, lists, etc., as required by law to submit with the plans and estimates of the board of directors to the state engineer."

In accordance with the direction contained in this order a map was prepared of the subdivisions and tracts with the rate per acre of such apportionment of such costs entered thereon, and certified to as follows: "Pioneer Irrigation District, Canyon and Ada Counties, Idaho. This

must bear upon its face a proper authentication that it is given by the petitioners; a mere unsigned and unauthenticated notice is not sufficient (In re Central Irr. Dist., 117 Cal. 382, 49 Pac. 354—1897; Ahern v. Board of Directors of High Line Irr. Dist., 39 Colo. 409, 89 Pac. 963—1907), and the defect cannot be cured by proof of actual knowledge upon the part of those to be affected by the proceedings. In re Central Irr. Dist., 117 Cal. 382, 49 Pac. 354 (1897).

c. Form of.

In the absence of any statutory provisions as to the required form of the notice to be given of the meeting of the board of supervisors in which a petition for the organization of an irrigation district will be presented, a publication of the petition itself will be sufficient in the absence of a statute forbidding a combination of petition and notice. Fogg v. Perris Irr. Dist., 154 Cal. 209, 97 Pac. 316 (1908). But where the statute requires the notice to be signed by the petitioners equally with the petition, a published notice of the application to the board of county commissioners under the Colorado Statute (Laws 1901, p. 199, § 2) setting out the petition in its entirety, was held not to be sufficient, for the reason that the signatures to the petition did not constitute signatures to the notice also. Ahern v. Board of Directors of High Line Irr. Dist., 39 Colo. 409, 89 Pac. 963 (1907). And a notice under the Colorado Statute in form as follows: "To the board of county commissioners * * * we the undersigned will present to your honorable body," etc., was held to be fatally defective in that it was misleading. Ahern v. Board of Directors of High Line Irr. Dist., 39 Colo. 409, 89 Pac. 963 (1907).

d. Description of District in.

The description of an irrigation district in the notice of presentation of petition to the board of supervisors is sufficient if the landmarks called for are definite, in the absence of evidence that such landmarks cannot be found upon the ground. Cullen v. Glendora Water Co., 113 Cal. 503, 512, 45 Pac. 822, 1047 (1896). See 39 Pac. 769 (1895). See *ante* II, B, 2. Such notice is not required to contain a description of the different tracts or legal subdivisions within the boundaries of the proposed district. Oregon Short Line R. Co. v. Pioneer Irr. Dist., 16 Idaho 578, 102 Pac. 904 (1909).

e. Service of.

All the proceedings for the formation of an irrigation district being proceedings *in rem* (Portneuf Irr. Co. Limited

certifies that this map has been prepared under the direction of the directors of the Pioneer Irrigation District and shows each legal subdivision and tract within said district, and the rate per acre apportioned or assessed against the same entered thereon, excepting the platted portion of the City of Caldwell included within said boundaries. Irvin Basset, President. Attest: R. H. Davis, Secty." The board also caused to be made a list of such apportionment or distribution containing a description of each subdivision or tract of land of such district with the amount and rate per acre of such apportionment or distribution of costs and the name of the owner thereof which is as follows: "This is to certify that the following is the list prepared by order of the board of directors of the Pioneer Irrigation District containing the names of the owners and a description of each lot and fraction of lot and block of the

v. Budge, 16 Idaho 116, 100 Pac. 1046—1909, see *post* III, D, this note), personal service on the landowners within the proposed irrigation district is not requisite to give jurisdiction; constructive service is sufficient. See In re Central Irr. Dist., 117 Cal. 382, 49 Pac. 354 (1897); Fogg v. Perris Irr. Dist., 154 Cal. 209, 97 Pac. 316 (1908); Portneuf Irr. Co. Limited v. Budge, 16 Idaho 116, 100 Pac. 1046 (1909); Knowles v. New Sweden Irr. Dist., 16 Idaho 217, 101 Pac. 81 (1908). See *post* III, F, 3, this note.

7. Presentation at "Regular Meeting."

Where the statute under which an irrigation district is formed requires the petition to be presented to the board "at a regular meeting thereof," a petition presented at a meeting of the board of commissioners held as and for a regular meeting, under an ordinance prescribing the meetings of the board, and which is the only "regular meeting" held for a long period, such meeting is "a regular meeting" within the meaning of the statute, and proceedings on the petition had thereat are valid. Central Irr. Dist. v. De Lappe, 79 Cal. 351, 21 Pac. 825 (1889).

8. Election.

a. Generally.

The statutes regulating the formation of an irrigation district provide for such organization by a majority vote of electors on the petition of the landowners (Marra v. San Jacinto & P. V. Irr. Dist., 131 Fed. 780—1904; Merchants' Nat. Bank v. Escondido Irr. Dist., 144 Cal. 329, 77 Pac. 937—1904; Rothchild v. Rollinger, 32 Wash. 307, 73 Pac. 367—1903), and some of the statutes require the electors to be freeholders within the proposed district. Little Walla Walla Irr. Dist. v. Preston, 46 Or. 5, 78 Pac. 982 (1904). Rothchild v. Rollinger, 32 Wash. 307, 73 Pac. 367 (1903).

b. Proclamation for.

The provisions of the Wright Act require that the election proclamation shall be published "for three weeks prior to the election." This statute simply designates the period of publication, not the number of insertions required to be made; the latter is left to the reasonable discretion of the board of supervisors. Central Irr. Dist. v. De Lappe, 79 Cal. 351, 21 Pac. 825 (1889).

c. Election Precincts.

Where the statute requires the election precincts to be established thirty days before the election to be held on a petition for the organization of an irrigation district, it is sufficient if the precincts are established by the proclamation calling for the election, which proclamation is required to be published

platted portion of the City of Caldwell, included within the boundaries of the irrigation district together with the amount apportioned or assessed against each lot by said board of directors in proportion to the benefits accruing thereto." Then follows a description of the town lots of the platted portion of the City of Caldwell. The board also prepared a list of other property and certified as follows: "This is to certify that the following is the list prepared under the direction of the board of directors of the Pioneer Irrigation District containing a description of each tract and legal subdivision within said district, and the name of the owner thereof with the amount per acre apportioned or assessed to the same by the said board of directors after a careful examination in proportion to the benefits accruing thereto, except in the platted portion of the City of Caldwell included within said district. The amount as apportioned or assessed against each acre in the following list is $6.00."

for three weeks. -Central Irr. Dist., v. De Lappe, 79 Cal. 351, 21 Pac. 825 (1889).

d. Keeping Open Polls.

A failure to keep the polls open for the entire time prescribed by the statute regulating the election for the formation of an irrigation district will be deemed a harmless irregularity where the election is held on the day and within the hours fixed by law, and a majority of the electors within the proposed district entitled to a vote, vote in favor of the proposition submitted. Baltes v. Farmers' Irr. Dist., 60 Neb. 310, 83 N. W. 83 (1900). See Piatt v. People, 29 Ill. 54 (1862); Cleland v. Porter, 74 Ill. 76 (1874); State ex rel. De Berry v. Nicholson, 102 N. C. 465, 9 S. E. 545 (1889); Fry v. Booth, 19 Ohio St. 25 (1869); Seymour v. Tacoma, 6 Wash. 427, 33 Pac. 1059 (1893). Otherwise, as to an election to confirm a bond issue under the California District Irrigation Act. See VI, D, 1, this note.

e. Canvassing Votes and Declaring Result.

To make the election valid the requirements of the law providing therefor must be pursued and substantially complied with in all respects. Thus the California Law requires that the board of directors of the irrigation district, on the canvass of the returns, shall declare the result and enter it of record. A failure to comply with this requirement makes the election invalid; the clerk of the board, of his own motion, has no authority to make a record of the declared result. Directors of Fallbrook Irr. Dist. v. Abila, 106 Cal. 365, 39 Pac. 793 (1895). See *post* VI, I, 1, this note.

The Washington Irrigation District Law (Act 1890, 1 Ballinger's Ann. Codes and Stats., § 4166) requires a submission of the question of the forming of the district to an election by the qualified electors who are also required to be freeholders, and provides that the board of county commissioners shall canvass the returns, "and if upon such canvass it appears that at least two thirds of all the votes cast were for the irrigation district, the board shall by an order entered on its minutes declare such territory organized as an irrigation district." Rothchild v. Rollinger, 32 Wash. 307, 73 Pac. 367 (1903).

C. Territorial Extent of District.

1. Decision of Board of Supervisors Conclusive.

The question as to whether the land embraced within a proposed irrigation district is of a character to be

Then follows a description of the legal subdivisions within said district, with the name of the owner and the benefits assessed against each legal subdivision. This list, however, does not contain the name of the Oregon Short Line Railroad Company or a description of its right of way or station grounds within said district, but it does contain a description of the legal subdivisions across which such right of way passes, and within which such station grounds are situated, and shows that the benefit assessed to each legal subdivision is $6 per acre. The statute, which requires the board to prepare a list, containing a complete description of each subdivision or tract of land within the district, with the amount and rate per acre of such apportionment or distribution of costs, and the name of the owner thereof, is not intended to require the list to contain an abstract of title to the land nor is it mandatory as to the ownership of such property.

benefited by the proposed system of irrigation is one which is committed to the board of supervisors on an application for the organization of the district (Herring v. Modesto Irr. Dist., 95 Fed. 705—1899), and a decision of the board as to what land will and what will not be benefited by irrigation within the district is conclusive so far as the organization of the district is concerned. Modesto Irr. Dist. v. Tregea, 88 Cal. 334, 26 Pac. 237 (1891). See People v. Hagar, 66 Cal. 59, 4 Pac. 951 (1884); People ex rel. Bettner v. Riverside, 70 Cal. 461 (1886); Andrews v. Lillian Irr. Dist., 66 Neb. 461, 97 N. W. 336 (1893); State v. Several Parcels of Land, 80 Neb. 424, 114 N. W. 283 (1907); Sowerwine v. Central Irr. Dist. (Neb., Dec. 23, 1909), 124 N. W. 118. At least in a collateral proceeding. Andrews v. Lillian Irr. Dist., 66 Neb. 461, 97 N. W. 336 (1893); Sowerwine v. Central Irr. Dist. (Neb., December 23, 1909), 124 N. W. 118. This is surely the case in the absence of fraud, of an abuse of power, or of objection by any landowner whose lands are either included or excluded; no objection can be taken to the action of the board in this regard. Cullen v. Glendora Water Co., 113 Cal. 503, 512, 45 Pac. 822, 1047 (1906). See 39 Pac. 769 (1895). See also Central Irr. Dist. v. De Lappe, 79 Cal. 351, 21 Pac. 825 (1889); Modesto Irr. Dist. v. Tregea, 88 Cal. 334, 20 Pac. 237 (1891); In re Madera Irr. Dist., 92 Cal. 296, 28 Pac. 272, 675, 27 Am. St. Rep. 106, 14 L. R. A. 755 (1891); Oregon Short Line R. Co. v. Pioneer Irr. Dist., 16 Idaho 578, 102 Pac. 904 (1909). But the question whether or not the land is under a ditch already constructed of sufficient capacity to water the land, is one which is not by the Statute of Nebraska left to the adjudication of the county board. State v. Several Parcels of Land, 80 Neb. 424, 114 N. W. 283 (1907).

Under the Idaho Statute (Laws 1899, p. 408) this is true, regardless of the question as to what particular use is being made of any particular tract or piece of land at the time the district is organized; and in determining whether lands will be benefited by a system of irrigation works, the board of county commissioners is not limited to lands which will be used for agricultural purposes or upon which water will be beneficially used, or to lands devoted to any particular use; but the board is empowered and given jurisdiction to determine whether all lands within the district will be benefited without reference to the use to which the same will be put. Oregon Short Line R. Co. v. Pioneer

We are of the opinion that inasmuch as the board has prepared a list containing the legal subdivisions across which the right of way of the railroad company passes, designating the rate per acre apportioned to such legal subdivision, that the board has substantially complied with the statute, although they have not designated in such list the description by metes and bounds of the right of way of the railroad company. The list thus prepared was notice to the railroad company that the benefits to each legal subdivision, across which the right of way passed, were fixed and determined at $6 per acre. As heretofore stated, the proceeding fixing benefits is a proceeding in rem against the land and not against the owner thereof; and when the board prepared a list of the lands within the district, and fixed the benefits accruing to each legal subdivision, the benefits thus fixed were laid against the land, and the railroad

Irr. Dist., 16 Idaho 578, 102 Pac. 904 (1909).

2. Inclusion.

a. Generally.

The statute providing for the inclusion within a proposed irrigation district of lands susceptible of one mode of irrigation from a common source and by the same system of works, and which will be benefited by such irrigation, and that no land shall be included in such a district except such as may be benefited by the system of irrigation to be established, means that the land must be such that it may thereby be substantially benefited. Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. 56 (1896). Where territory has not been included within the boundaries of such a district in accordance with the laws providing for the formation thereof and taking territory into the district, the district has no power or jurisdiction to assess such property. Oregon Short Line R. Co. v. Pioneer Irr. Dist., 16 Idaho 578, 102 Pac. 904 (1909). See *post* VII, N, 1 and 2, this note.

b. Change of Boundaries.

Where an irrigation district attempts to change the boundaries thereof so as to include other territory, but fails to give the notice required by the statute of the intention of such district to so change the boundaries, and the owners of lands attempted to be taken into such district by such change of boundaries not being given notice of the change, and the inclusion of their lands within the district, are not prevented from challenging the legality of the change until they have had their day in court. Oregon Short Line R. Co. v. Pioneer Irr. Dist., 16 Idaho 578, 102 Pac. 904 (1909). See *ante* II, B, 2, a, and b, this note.

c. Assessment of Benefits.

(1) Idaho Act.

The Idaho Statute requires the board of commissioners to assess benefits against each legal subdivision or tract within the proposed district, and where less than a legal subdivision or tract is benefited in a different degree or amount than the remainder of the legal subdivision or tract, the board is required to fix and determine the benefits accruing to such particular tract; but where an entire legal subdivision is equally benefited the assessment may be laid against the entire subdivision, thus including the smaller or fractional parts thereof. Oregon Short Line R. Co. v. Pioneer Irr. Dist., 16 Idaho 578, 102 Pac. 904 (1909). Any one dissatisfied therewith may have the action of the board reviewed as provided by the irrigation act (Idaho Sess. L. 1899, p.

company was thus advised that the benefits to each legal subdivision, across which its right of way passed, were fixed and determined to be $6 an acre. If, then, the assessment of benefits is charged against the land and the proceedings are in rem against the land, the owner's name is not an essential part of the description, and the assessment of benefits made against the land is a substantial compliance with the statute, and a sufficient notice to the owner of the benefits charged and adjudged to be against said property. Coolige v. Pierce County, 28 Wash. 95, 68 Pac. 391; Woodward v. Taylor, 33 Wash. 1, 73 Pac. 785, 75 Pac. 646; Best v. Wohlford, 144 Cal. 733, 78 Pac. 293. In the case of Co-operative, etc., Ass'n v. Green, 5 Idaho 660, 51 Pac. 770, in discussing the question of taxation, this court said: "Substantial compliance with the requirements of the law in making assessment is all that is necessary. If

408). Portneuf Irr. Co. Limited v. Budge, 16 Idaho 116, 100 Pac. 1046. (1909).

(2) Assessing Tracts and Listing.

The Idaho Law requiring the assessment of benefits (Laws 1899, p. 411, § 11, as amended by Laws 1901, p. 194, § 2) requires the board to examine all tracts and legal subdivisions within the boundaries of the district, and apportion the benefits according to their judgment; but it does not require the board, in designating these benefits, to particularly and specifically describe each tract or fractional part of such legal subdivision according to the separate ownership thereof, in those cases where the benefits accruing to all parts of such legal subdivision are the same; and if it fails to list the lands according to separate ownership, but lists them according to each legal subdivision, this does not show that the board did not intend to assess benefits to all the lands within the legal subdivision. Oregon Short Line R. Co. v. Pioneer Irr. Dist., 16 Idaho 578, 102 Pac. 904 (1909). In those cases, however, where the board in assessing benefits determines that any part or tract less than a legal subdivision will be benefited differently from the remainder or other part of the tract, then the board is required to designate and describe the benefits of such particular tract or fractional part. Oregon Short Line R. Co. v. Pioneer Irr. Dist., 16 Idaho 578, 102 Pac. 904 (1909).

(3) Railway Right of Way, Stations, etc.

In assessing benefits to accrue to lands within a proposed irrigation district, the question whether or not the right of way and station grounds of a railroad company will be benefited is committed to the judgment of the board of county commissioners, and when this board has determined that such lands will be benefited and includes such right of way, station grounds, etc., within the district, the action of the board is final and conclusive against collateral attack. The mere fact that at the time the lands are being used for right of way and depot purposes is not a reason why such land will not be benefited by a system of irrigation works controlled by the irrigation district; the question of benefit is to be determined with reference to the natural state and condition of the land and not with reference to the use to which the land is put. Oregon Short Line R. Co. v. Pioneer Irr. Dist., 16 Idaho 578, 102 Pac. 904 (1909).

Where the board of county commissioners in preparing a list of the lands against which benefits are laid, designates upon such list the legal subdivisions across which the right of way of

property is a subject of taxation, it cannot escape through some technical failure of the officer to perform his duty, unless it has actually misled the party, to his injury."

So, in the case under consideration, the board having determined that all the land within the district was benefited, and such benefit was determined to be $6 an acre, and the same was laid against each legal subdivision within the district across and within which the company's property was located, the company should not be allowed to escape the burden of taxation upon the sole ground that, in making a list of the several tracts of land within the district, the officers of said district failed to designate thereon the particular and accurate description of the company's right of way and depot grounds. It will also be perceived that the owner of each legal subdivision within the district is designated,

a railroad company passes, and designates the rate per acre apportioned to each legal subdivision, this is a substantial compliance with the statute, and is not void because the right of way is not particularly and separately described, and the list thus prepared is notice to the railroad company of the benefits assessed against each legal subdivision of which its right of way is a part, and the absence of objection on the part of the company on account of a defective description or want of description at the time of hearing and confirmation of the district, the railroad is concluded from a collateral attack upon the action of the commissioners. Oregon Short Line R. Co. v. Pioneer Irr. Dist., 16 Idaho 578, 102 Pac. 904 (1909).

(4) Constitutionality of Statute.

The fact that the Idaho Statute makes no provision for notice to the landowners that on a particular day an assessment of benefits to the lands within the district will be made, does not render it unconstitutional, provision being made in the statute for notice to be given of the proceedings to organize such district and notice of the hearing for the confirmation of the organization and proceedings of such district, at which hearing the court is required to examine all the proceedings involved in the organization of a district including the assessment of benefits. Oregon Short Line R. Co. v. Pioneer Dist., 16 Idaho 578, 102 Pac. 904 (1909).

d. Public Lands.

The fact that public lands which have been granted to a railroad company, but not yet deeded to it, and which have been sold by the railroad company to bona fide purchasers who are citizens of the United States, before the organization of the district, does not make the organization invalid. Modesto Irr. Dist. v. Tregea, 88 Cal. 334, 26 Pac. 237 (1891); In re Madera Irr. Dist., 92 Cal. 296, 28 Pac. 272, 675, 27 Am. St. Rep. 106, 14 L. R. A. 755 (1891); Cullen v. Glendora Water Co., 113 Cal. 503, 513, 45 Pac. 822, 1047 (1896). See 39 Pac. 769 (1895).

e. City or Town.

In the organization of an irrigation district all lands which in their natural state would be benefited by irrigation, and are susceptible of irrigation by one system are to be included within the district regardless of the question as to what particular use is being made of any particular tract or piece of land at the time the district is organized. Oregon Short Line R. Co. v. Pioneer Irr. Dist., 16 Idaho 578, 102 Pac. 904 (1909). Hence it has been held that a city or town may rightfully be included within an

although the owners of fractional parts thereof are not designated. So the list designates the legal subdivisions across and within which the company's right of way and station grounds are located. The fact that the list designates the assessment of benefits to the particular legal subdivision is, in our judgment, a substantial compliance with the law; and the fact that the list fails to contain the name of the true owner of such legal subdivision or fractional part thereof does not render void the action of the board in fixing and determining the question of benefits. To permit the railroad company to escape its share of the burdens imposed upon said district by such improvement, because the officers in making up the list of lands and fixing the benefits failed to specifically and accurately describe the company's right of way and station grounds and designate the railway company as the owner thereof, would be to exact from the officials of such district a strictness in official acts which, in our

irrigation district in those cases where it is determined by the board that the lands comprising a city or town will be benefited by irrigation, and that such inclusion will not invalidate the organization of the irrigation district. Modesto Irr. Dist. v. Tregea, 88 Cal. 334, 26 Pac. 237 (1891); In re Madera Irr. Dist., 92 Cal. 296, 28 Pac. 272, 675, 27 Am. St. Rep. 106, 14 L. R. A. 755 (1891). Nampa & M. Irr. Dist. v. Brose, 11 Idaho 474, 83 Pac. 499 (1905). And this is true regardless of the fact that buildings or other structures have been erected upon small lots, thereby rendering them unfit for cultivation. Modesto Irr. Co. v. Tregea, 88 Cal. 334, 26 Pac. 237 (1891).

f. Waiver of Right.

Under the Idaho Irrigation District Law (Laws 1903, p. 150) a landowner within the proposed district may, without the consent of the district, waive his right to water from such district in those cases where it is made to appear that no one residing within the district is injured or prejudiced thereby, and in such a case no part of the bond issue can be apportioned to his land. Nampa & M. Irr. Dist. v. Brose, 11 Idaho 474, 83 Pac. 499 (1905). See Portneuf Irr. Co. Limited v. Budge, 16 Idaho 116, 100 Pac. 1046 (1909).

3. Exclusion.

a. Generally.

The California Wright Act provides that the board of county supervisors shall exclude from the district any lands which will not, in the opinion of the board, be benefited by the system of irrigation to be established; and where lands are included within the district after an opportunity for the owners thereof to be heard, this is in and of itself a determination that the lands will be benefited. Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. 56 (1896).

The matter of the exclusion of land rests entirely in the discretion of the board of supervisors, and is a matter which cannot be then delegated to another. Thus, where the board of county commissioners referred requests for the exclusion of land to a committee of the petitioners who had in charge the organization of the district, and thereafter affirmed the determination of such committee without investigation, this was held to be an abuse of the power conferred upon the board of county commissioners by Colorado Laws 1901, p. 199, § 2. Ahern v. Board of Directors of High Line Irr. Dist., 39 Colo. 409, 89 Pac. 963 (1907).

In Idaho and Nebraska special provisions are made and proceedings pre-

judgment, was not intended by the statute. In the case of Pioneer Irr. Dist. v. Bradbury, 8 Idaho 310, 68 Pac. 295, 101 Am. St. Rep. 201, this court held: "But the amendatory act clearly provides for assessments to be made according to the benefits accruing to each tract of land in such district, and the action of the board in preparing lists of all real estate in their district, by which the assessments each year shall be made, may be contested in the district court, on the ground that such lists are not made with reference to the benefits accruing to each tract of land."

If, then, the railway company was dissatisfied with the assessment of benefits or the list made, it should have appeared and contested the same in the district court, and having failed to do so is concluded by the judgment of the district court. Counsel for respondent however contend that this court erred in the case of Pioneer Irr. Dist. v. Bradbury

scribed for the exclusion of lands which are already under a ditch carrying sufficient water for irrigation or which are by their nature nonirrigable. See *post* II, C, 3, c and d.

b. After Organization.

After the organization of an irrigation district, the exclusion of part of the lands therefrom does not destroy its identity as an irrigation district; and where at the time of the exclusion the district has no indebtedness, and no interested party objects, there is no basis for a claim of injury or of the violation of any constitutional rights. Modesto Irr. Dist. v. Tregea, 88 Cal. 334, 26 Pac. 237 (1891).

The Nebraska Statute, providing that in no case shall lands be held within any irrigation district which from some natural cause cannot be irrigated, provides the procedure for detaching such lands from the district after organization, and also provides the method of detaching lands other than those which cannot from some natural cause be irrigated, and the procedure therein prescribed is exclusive. Andrews v. Lillian Irr. Dist., 66 Neb. 461, 97 N. W. 336 (1893); Sowerwine v. Central Irr. Dist. (Neb., Dec. 23, 1909), 124 N. W. 118.

c. Land Already under Ditch.

By provisions of the Idaho and Nebraska Irrigation District Laws, the owner of lands already having ditches of sufficient capacity to water said lands, having water and not receiving any benefits from the organization of the district, upon proper showing being made, is entitled to have his lands excluded from the district and from all liability or responsibility for assessments of the district as well as from the benefits and protection of the landowners in such districts. Nampa & M. Irr. Dist. v. Brose, 11 Idaho 474, 83 Pac. 499 (1905); Portneuf Irr. Co. Limited v. Budge, 16 Idaho 116, 100 Pac. 1046 (1909); State v. Several Parcels of Land, 80 Neb. 424, 114 N. W. 283 (1907).

d. Nonirrigable Lands.

Under the provisions of all the irrigation district laws, nonirrigable lands, or lands which from their nature are not susceptible of receiving and using water from the irrigation system to be established, are to be excluded from the district, and the method of procedure for such exclusion is provided for. Under the Nebraska Law (Const. Stats. 1903, c. 93a) a petition for the exclusion of lands from an irrigation district alleging the fact to be that the lands are low, wet, and swampy, totally unfit for irrigation, and require drainage of the water naturally standing thereon before the same can be tilled, is equivalent to

in holding any one owning land in such district may appear and show that the cost of irrigation works of such district has not been apportioned or distributed in proportion to the benefits accruing to any tract of land in said district, for the reason that at the final hearing the court is only authorized to approve or disapprove the proceedings either in whole or in part, but that no jurisdiction is given to revise the proceedings or to correct any errors that may be found therein; and that no provision is made for further proceedings in case the court disapproves any proceeding already had.

Section 16 of the irrigation act (Laws 1899, p. 417) authorizes the board of directors of the irrigation district to file in the district court a petition, praying in effect that the proceedings aforesaid may be examined, approved, and confirmed by the court. Section 17 requires the court to fix a time for the hearing and for notice thereof.

an allegation that such lands cannot from natural cause be irrigated. Andrews v. Lillian Irr. Dist., 66 Neb. 461, 97 N. W. 336 (1893). It is held, however, that equity will not interpose to separate nonirrigable lands from an irrigation district unless it be shown that the plaintiff has sought to avail himself of the procedure established by the Irrigation District Law, providing for effecting such separation. Andrews v. Lillian Irr. Dist., 66 Neb. 461, 97 N. W. 336 (1893).

D. Watering Lands Outside of District

An irrigation company or district cannot be compelled to furnish water to put upon lands outside of the irrigation district; and where a company or district does consent to furnish surplus water for the purpose of watering lands outside of the district, no indefeasible right exists to the use of such water, if thereby secured, and the district or company may discontinue the service whenever the needs of landowners within the district require the water. See *post* VIII, B, 2, this note.

The fact that an irrigation district does furnish water for use on lands outside of the district will not affect either the validity of the organization of the district (Settlers' Irr. Dist. v. Settlers' Canal Co., 14 Idaho 504, 94 Pac. 829—1908), or the validity of a bond issue of the district. See *post* VI, P, this note.

E. Costs and Expenses.

The Irrigation Law of California, known as the Wright Act, is evidently framed upon the theory and with the intention on the part of the legislature that the affairs of the district shall be conducted upon a ready-money basis, and not upon credit. Hughson v. Crane, 115 Cal. 404, 47 Pac. 120 (1896). The board of directors are empowered to levy an assessment to create a fund out of which to pay current and incidental expenses, including the salaries of officers. See *post* VII, G, this note.

Under section 24 of the Nebraska Irrigation Act (Sess. Laws 1895, c. 70) all expenses incurred for the construction of the irrigation works are to be paid wholly out of the construction fund, and no indebtedness or liability against the district for labor performed in the work of construction can be incurred by the board of directors where no construction fund has been created out of which such indebtedness may be paid. Lincoln & Dawson County Irr. Dist. v. McNeal, 60 Neb. 621, 83 N. W. 847 (1900).

Under the Oregon Irrigation District Law (Laws 1895, p. 19) the cost and expenses of purchasing and acquiring

Section 18 provides: "Any person interested in said district, or in the issue or sale of said bonds, may demur to or answer said petition."

Section 19 provides that: "Upon the hearing of such special proceeding, the court shall have power and jurisdiction to examine and determine the legality and validity of, and approve and confirm each and all of the proceedings for the organization of said district under the provisions of the said act, from and including the petition for the organization of the district, and all other proceedings which may affect the legality or validity of said bonds, and the order for the sale, and the sale thereof. The court, in inquiring into the regularity, legality or correctness of said proceedings, must disregard any error, irregularity, or omission which does not affect the substantial rights of the parties to said special proceeding; and it may approve and confirm such proceed-

property and constructing the works and improvements are fully provided for. Little Walla Walla Irr. Dist. v. Preston, 46 Or. 5, 78 Pac. 982 (1904).

As to payment of salaries of officers and other operating expenses, see *post* V, F, 1 and 2, this note.

Under the Washington Irrigation District Laws (Laws 1895, p. 143), warrants issued by county commissioners for construction of ditches for agricultural, sanitary, and domestic purposes are to be paid, in the order of their issue, out of the "ditch fund" raised by special assessment provided for by the Act. State ex rel. Rush v. St. John, 30 Wash. 630, 71 Pac. 192 (1903). Such warrants issued are payable in full in order of issue, regardless of the shortage of funds to pay all, and they draw interest from date of presentation. State ex rel. Rush v. St. John, 30 Wash. 630, 71 Pac. 192 (1903).

III. Confirmation Proceedings.

A. In General.

The proceeding to confirm an irrigation district is not the same as a proceeding for the organization thereof. People v. Perris Irr. Dist., 142 Cal. 601, 76 Pac. 381 (1904).

The California Confirmation Act of March 16, 1889, is separate and distinct from the irrigation district law known as the Wright Act (see I, E, 2, this note), and provides for the examination, approval, and confirmation of the proceedings for the organization of the district, and for the issue of bonds and the sale of bonds issued under the Wright Act (Stats. 1889, p. 12). Crall v. Poso Irr. Dist., 87 Cal. 140, 26 Pac. 797 (1890); Modesto Irr. Dist. v. Tregea, 88 Cal. 334, 26 Pac. 237 (1891), affirmed in 164 U. S. 179, 41 L. Ed. 395, 17 Sup. Ct. 52 (1896); In re Madera Irr. Dist., 92 Cal. 296, 28 Pac. 272, 675, 27 Am. St. Rep. 106, 14 L. R. A. 755 (1891); Fallbrook Irr. Dist. v. Abila, 106 Cal. 355, 39 Pac. 794 (1895); Cullen v. Glendora Water Co., 113 Cal. 503, 45 Pac. 822, 1047 (1896), see 39 Pac. 769 (1895); In re Central Irr. Dist., 117 Cal. 382, 49 Pac. 354 (1897).

B. Constitutionality.

The California Confirmation Act of March 16, 1889, regarding proceedings for confirmation of organization and issuance of bonds by irrigation districts, empowering the superior court to hear and determine what will be the rights of parties interested in the bonds in advance of any controversy as to such rights, is not unconstitutional because of such power conferred. Cullen v. Glendora Water Co., 113 Cal. 503, 512, 45 Pac. 822, 1047 (1896), see 39 Pac. 769 (1895).

ings in part, and disapprove and declare illegal or invalid other and subsequent parts of the proceedings."

Section 11 of the act of March 18, 1901, amending the law of 1899, among other things provides: "Provided, that the proceedings of said board of directors in making such apportionment of cost and the said list of apportionment shall be included, with other features of the organization of such district which are subject to judicial examination and confirmation as provided in sections sixteen, seventeen, eighteen, nineteen and twenty of this act."

It will thus be seen that this statute expressly authorizes the court at the hearing for confirmation to examine and determine the legality and validity of and approve and confirm each and all of the proceedings for the organization of said district under the provisions of said act, from and

C. Construction.

The California Confirmation Act of March 16, 1889, is a separate and independent statute amendatory of the Wright Act, no part of which provided special proceedings in which the aid of the court may be invoked to secure evidence and determine as to the due and regular organization of any irrigation district and the regularity of any bond issue by it, and the limitation of two years provided in section 3 of the Wright Act of 1891, in which a suit shall be commenced or defense made attacking the validity of the organization, does not apply to special proceedings instituted by the board under the Act of 1889. In re Central Irr. Dist., 117 Cal. 382, 49 Pac. 354 (1897).

D. Nature of Proceedings.

The proceedings for the confirmation of the legality of the organization of an irrigation district and of the issuance of bonds and the sale of bonds by the district are proceedings *in rem*.

United States.—Tregea v. Modesto Irr. Dist., 164 U. S. 179, 41 L. Ed. 395, 17 Sup. Ct. 52 (1896); Perris Irr. Dist. v. Thompson, 116 Fed. 832 (1902).

California.—Crall v. Poso Irr. Dist., 87 Cal. 140, 26 Pac. 797 (1890); Modesto Irr. Dist. v. Tregea, 88 Cal. 334, 26 Pac. 237 (1891); In re Madera Irr. Dist., 92 Cal. 296, 28 Pac. 272, 675, 27 Am. St. Rep. 106, 14 L. R. A. 755 (1891); Rialto Irr. Dist. v. Brandon, 103 Cal. 384, 37 Pac. 484 (1894); Directors Fallbrook Irr. Dist. v. Abila, 106 Cal. 365, 39 Pac. 793 (1895); Cullen v. Glendora Water Co., 113 Cal. 503, 45 Pac. 822, 1047 (1896), see 39 Pac. 769 (1895); People v. Linda Vista Irr. Dist., 128 Cal. 477, 481, 61 Pac. 86 (1900); People ex rel. Fogg v. Perris Irr. Dist., 132 Cal. 289, 64 Pac. 399 (1901); People v. Perris Irr. Dist., 142 Cal. 601, 67 Pac. 381 (1904).

Idaho.—Portneuf Irr. Co. Limited v. Budge, 16 Idaho 116, 100 Pac. 1046 (1909); Knowles v. New Sweden Irr. Dist., 16 Idaho 217, 101 Pac. 81 (1908); Oregon Short Line R. Co. v. Pioneer Irr. Dist., 16 Idaho 578, 102 Pac. 904 (1909).

But the proceeding may be attacked for fraud in procuring the organization or the decree of confirmation. See *post* III, J, 4, this note.

Such proceedings are authorized for the express purpose of fixing the legal status of the corporation and the decree rendered thereat concludes the whole world upon all the questions involved, Perris Irr. Dist. v. Thompson, 116 Fed. 832 (1902); Crall v. Poso Irr. Dist., 87 Cal. 140, 26 Pac. 797 (1890); Rialto Irr. Dist. v. Brandon, 103 Cal. 384, 37 Pac. 484 (1894); Cullen v. Glendora Water

including the petition for the organization of the district, and all other proceedings which may affect the legality or validity of said bonds and the order for the sale and the sale thereof, including the proceedings of the board of directors in making and apportioning the costs and the list of such apportionment. The list of apportionment of costs thus referred to is the costs required to be apportioned by the board over the tracts and subdivisions of land within the district according to the benefits accruing thereto, as provided in said section. It will thus be seen that the railroad company was given notice of the hearing for confirmation of the district, given an opportunity to object to the amount of benefits laid against its lands within the district, and given the same opportunity given to every other landowner of such hearing; thus giving to the railway company its day in court at which the railway company

Co., 113 Cal. 503, 45 Pac. 822, 1047 (1896), see 39 Pac. 769 (1895); People v. Linda Vista Irr. Dist., 128 Cal. 477, 61 Pac. 86 (1900); People ex rel. Fogg v. Perris Irr. Dist., 132 Cal. 289, 64 Pac. 399 (1901); People v. Perris Irr. Dist., 142 Cal. 601, 67 Pac. 381 (1904); and are *res adjudicata* as to all issues before the court. Miller v. Perris Irr. Dist., 85 Fed. 693 (1898). See *post* III, J, 5, this note.

E. Directors May Institute.

An action for the confirmation of the proceedings in the organization of the district may be brought by the board of directors of the district on proper petition therefor. In re Central Irr. Dist., 117 Cal. 382, 387, 49 Pac. 354 (1897); Nampa & M. Irr. Dist. v. Brose, 11 Idaho 474, 83 Pac. 499 (1905).

Under the irrigation district laws the determination of the board of county supervisors, or other board to which the petition for the organization of an irrigation district is submitted, as to the facts respecting the validity of the organization of the district is not conclusive, but their action in this regard is to be reviewed by special proceedings for confirmation. In re Central Irr. Dist., 117 Cal. 382, 387, 49 Pac. 354 (1897).

F. Notice of.

1. Generally.

The notice of the hearing of the petition for confirmation may be given in the same manner as the notice of the application to the board of supervisors or board of county commissioners for the formation of an irrigation district. See II, B, 6, e, this note.

2. Contents of, Description.

The description of the proposed irrigation district by boundaries, as required in the notice of proceedings for organization of the district (II, B, 6, d, this note) is not required in the notice for confirmation of the organization, or of the issuance of bonds; a description by the name of the district is held sufficient, because the law requires the board, on declaring the organization of the district, to cause a copy of such order, duly certified, to be immediately filed for record in the county in which the land lies, and the record thus made constitutes constructive notice of the location and boundary lines of the district to all inhabitants and other interested parties. Fogg v. Perris Irr. Dist., 154 Cal. 209, 97 Pac. 316 (1908). All changes in boundaries of the proposed district requiring record, in the same manner as in the fixing of the original boundaries, the record furnishes to all parties interested constructive notice of such changes. Fogg v. Perris Irr. Dist., 154 Cal. 209, 97 Pac. 316 (1908). See *ante* II, B, 2, b, this note.

was given an opportunity to contest the question as to whether or not the benefits assessed to its property were out of proportion to the benefits assessed to other property, as well as the sufficiency of the list thus prepared. The railway company having made no appearance at such hearing or made any objection to the apportionment of benefits of the list made, is concluded by the judgment of the district court confirming said district and said assessment; and the same cannot be called in question or attacked in this collateral proceeding.

Counsel for respondent also argue that it is shown by the pleadings that the officers of the irrigation district were acquainted with the character and extent of the right of way owned by the plaintiff, and that the law also made it their duty to examine each tract or legal subdivision critically, and by so doing they would thus have become acquainted

3. Personal Service of Not Necessary.

The various irrigation district laws providing for service of notice of confirmation by publication, and posting and personal service upon the landowners of the district, is not necessary in order to give the court jurisdiction and power to render a judgment of confirmation valid and binding against such property owners upon all questions involved in the case, such service by publication or by publication and posting being sufficient. Crall v. Poso Irr. Dist., 87 Cal 140, 146, 26 Pac. 797 (1890); In re Central Irr. Dist., 117 Cal. 382, 49 Pac. 354 (1897); Fogg v. Perris Irr. Dist., 154 Cal. 209, 97 Pac. 316 (1908); Ahern v. Board of Directors of High Line Irr. Dist., 39 Colo. 409, 89 Pac. 963 (1907); Nampa & M. Irr. Dist. v. Brose, 11 Idaho 474, 83 Pac. 499 (1905); Portneuf Irr. Co. Limited v. Budge, 16 Idaho 116, 100 Pac. 1046 (1909); Knowles v. New Sweden Irr. Dist., 16 Idaho 217, 101 Pac. 81 (1908). See Mayo v. Ah Loy, 32 Cal. 477, 91 Am. Dec. 595 (1867); People v. Doe, 36 Cal. 220 (1868); Eitel v. Foote, 39 Cal. 439 (1870). See ante II, B, 6, e, this note.

G. Jurisdiction.

1. Generally.

The California Confirmatory Act of March 16, 1889, confers jurisdiction upon the court only to "examine and determine the legality and validity of, and approve and confirm" the proceedings under the statute for the formation of the district; and any other or further judgment or decree entered is unauthorized. In re Madera Irr. Dist., 92 Cal. 296, 28 Pac. 272, 675, 27 Am. St. Rep. 106, 14 L. R. A. 755 (1891).

Jurisdiction is conferred upon the court by the Confirmatory Act of 1889 only in those cases where the bonds of the district are sold, under section 16 of the Wright Act, to raise money for investment in a water system, and does not apply to section 12 of the Wright Act, providing for bonds to purchase property therein authorized. Leeman v. Perris Irr. Dist., 140 Cal. 540, 74 Pac. 24 (1903).

Under the Idaho Irrigation District Laws (Laws 1899, p. 408, § 2, as amended by Laws 1901, p. 194, § 11) it is provided that "the proceedings of said board of directors in making such apportionment of cost and the said list of such apportionment shall be included, with other features of the organization of such district which are subject to judicial examination and confirmation, as provided in sections 16-20, of this Act." Oregon Short Line R. Co. v. Pioneer Irr. Dist., 16 Idaho 578, 102 Pac. 904 (1909).

with the particular lands owned by the railway company, and because the particular tract owned by the railway company is not designated upon the list, that the board of directors did not intend to assess benefits against the same, and that in fact no assessment was made or intended to be made against such right of way. This argument of counsel overlooks the fact that the statute does not intend that the board shall lay the assessment of benefits to the several tracts of land according to each separate ownership. The intention of the statute evidently was to require the board to lay the assessment of benefits against each legal subdivision within said district, and where less than a legal subdivision was benefited in a different degree or amount than the entire legal subdivision, then the board is required by the statute to fix and determine the benefit accruing to such particular tract; but where the entire legal

Jurisdiction of court to make adjudication confirming the organization of an irrigation district is not affected by fraud in creating dummy or fictitious freeholders for the purpose of signing the petition for formation of the district, where the fraud does not appear upon the face of the record. Fogg v. Perris Irr. Dist., 154 Cal. 209, 214, 97 Pac. 316 (1908). See *ante* II, B, 3, c, this note.

2. Questions Reviewable.

On notice of application to confirm the issue of bonds, based on the petition required by the statute, an inquiry into the validity of the original organization of the district is necessarily involved, and the confirmatory decree may adjudge the validity of the organization of the district without special prayer in that behalf. Fogg v. Perris Irr. Dist., 154 Cal. 209, 217, 97 Pac. 316 (1908). See *post* VI, D, 5 and 7, this note. And the court is empowered and given jurisdiction, upon the hearing, to examine and determine the legality and validity of, and to approve and confirm, each and all of the steps in the proceedings for the organization of the district and the issuance and sale of bonds, from and including the petition for the organization. Fogg v. Perris Irr. Dist., 154 Cal. 209, 217, 97 Pac. 316 (1908); Nampa & M. Irr. Dist. v. Brose, 11 Idaho 474, 83 Pac. 499 (1905); Oregon Short Line R. Co. v. Pioneer Irr. Dist., 16 Idaho 578, 102 Pac. 904 (1909); Board of Directors of Alfalfa Irr. Dist. v. Collins, 46 Neb. 411, 64 N. W. 1086 (1895). And in Idaho the court may review and approve the apportionment of costs and assessment of benefits, and the lists thereof. Oregon Short Line R. Co. v. Pioneer Irr. Dist., 16 Idaho 578, 102 Pac. 904 (1909).

3. Illegal Bond Issue.

It has been said that a decree of the court confirming void bonds, not issued nor sold under the terms of the Wright Act, and not within the Confirmation Act of March 16, 1889, is void for want of jurisdiction of the subject-matter. Leeman v. Perris Irr. Dist., 140 Cal. 540, 74 Pac. 24 (1903). In the case of proceedings for the confirmation of a district illegally organized, where the bonds thereof have been issued, some of which have been sold to bona fide holders, the rights of such holders will not be determined in such action for the reason that such rights can be determined only in a proper action to which they are made parties. In re Central Irr. Dist., 117 Cal. 382, 49 Pac. 354 (1897).

H. Errors, etc., Disregarded.

In a proceeding for the confirmation of an irrigation district formed under

subdivision is benefited equally, then the board may lay such assessment against the legal subdivision as such, and such action includes all parts thereof; and the mere fact that the board have failed to designate the true owner of a portion of such legal subdivision will not affect the legality of the assessment made, where it is clearly shown that it was the intention and purpose, and the board in fact did assess the benefits equally to all parts of such tract. The railroad company knew what property it owned; it knew the legal subdivisions over which its right of way passed and knew the benefits assessed to such legal subdivisions, and was advised by the list prepared of such fact, just as effectively as though the right of way had been described by metes and bounds.

In this connection counsel for respondent also argue that inasmuch as the district made no effort to collect any taxes upon the plaintiff's right

the Idaho Irrigation Laws (Laws 1903, p. 150), the court must disregard any error, irregularity or omission which does not affect the substantial rights of the parties to such proceedings. Nampa & M. Irr. Dist. v. Brose, 11 Idaho 474, 83 Pac. 499 (1905).

I. Issues.

1. Generally.

In an action for the confirmation of an irrigation district or the issuance and sale of bonds thereby, any person interested in the district may appear and resist the application. Board of Directors of Alfalfa Irr. Dist. v. Collins, 46 Neb. 411, 64 N. W. 1086 (1895).

Where proceedings for the confirmation of the organization of an irrigation district are contested by answer, it is necessary for the directors of the district to prove that a petition was presented to the board of supervisors signed by fifty, or a majority, of the freeholders owning land within the district; the proof of such petition cannot be made by recitals in the record of the board of supervisors, and the petition itself cannot be properly received in evidence without proof of its execution and that the signers thereof were freeholders of the district. In re Madera Irr. Dist., 92 Cal. 296, 28 Pac. 272, 675, 27 Am. St. Rep. 106, 14 L. R. A. 755 (1891). See *ante* II, B, 3, a, this note.

2. Defense of Fraud.

The defense of fraudulent organization being set up to confirmation proceedings, the fact that the statute of limitations is available to the district as a defense (see *post* IV, F, this note) does not prevent the issue from being shown on the merits. People v. Perris Irr. Dist., 142 Cal. 601, 76 Pac. 381 (1904).

3. Burden of Proof.

In an action for the confirmation of the organization of an irrigation district and of the issuance and sale of bonds thereby, the corporation is the actor and has the burden of proof to establish the issues. In re Madera Irr. Dist., 92 Cal. 296, 330, 339, 28 Pac. 272, 675, 27 Am. St. Rep. 106, 14 L. R. A. 755 (1891); Directors of Fallbrook Irr. Dist. v. Abila, 106 Cal. 365, 39 Pac. 793 (1895). As to burden of proof in action to confirm a bond issue, see *post* VI, D, 6, this note. And where an issue is made touching the qualifications of the signers of the petition, the burden is upon the board of directors to prove the qualifications of the signers, the decision of the board of county commissioners that in their judgment they were such, is not sufficient proof. Ahern v. Board of Directors of High Line Irr. Dist., 39 Colo. 409, 89 Pac. 963 (1907).

of way for the years 1902, 1903, and 1904, that this clearly indicates that the board did not consider such property subject to assessment. The law, however, determines the duty of the respondent's property to contribute its share of the taxes of said district; and the fact that the officials of such district did not attempt to collect taxes against such property during any one or more years, would not relieve such property of its share of taxation or its liability to be assessed according to law within said district. We are unable to discover any reason, either in law or equity, why the respondent's property should be relieved from its liability to taxation for the benefit of said district from the mere fact that the officials of said district failed to list and assess such property for any particular year. The liability of the respondent's property for taxation is fixed by law and not by the acts of the officials in listing and assessing such

J. Decree of Confirmation.

1. Generally.

The decrees of the state court having jurisdiction, approving the organization of an irrigation district, are conclusive against any attack upon the validity of the organization. Miller v. Perris Irr. Dist., 85 Fed. 693 (1898); Crall v. Poso Irr. Dist., 87 Cal. 140, 26 Pac. 797 (1890); Rialto Irr. Dist. v. Brandon, 103 Cal. 384, 37 Pac. 484 (1894). See also In re Central Irr. Dist., 117 Cal. 382, 49 Pac. 354 (1897). And the decisions of the state court are binding upon the federal courts. Miller v. Perris Irr. Dist., 85 Fed. 693 (1898). See *ante* III, D, this note.

2. Collateral Attack.

A judgment and decree confirming the organization of an irrigation district, etc., cannot be assailed collaterally in quo warranto proceedings or otherwise. People ex rel. Fogg v. Perris Irr. Dist., 132 Cal. 289, 64 Pac. 399 (1901); Portneuf Irr. Co. Limited v. Budge, 16 Idaho 116, 100 Pac. 1046 (1909). See *post* IV, D and E, this note.

3. Bond Issue.

Decree confirming proceeding for sale of bonds, made in pursuance of the statute, confirming the original proceedings for the formation of the district, and subsequent proceedings changing the boundaries and approving bond sales, made after a first invalid decree confirming proceedings of the district up to an order for the sale of certain bonds, will protect the district and the bondholders against any attack upon the validity of the district organization or the issuance of bonds, and will render harmless any error of the trial court in holding the first decree invalid. Fogg v. Perris Irr. Dist., 154 Cal. 209, 217, 97 Pac. 316 (1908). See People v. Linda Vista Irr. Dist., 128 Cal. 477, 480, 61 Pac. 86 (1900).

Such adjudication determining the validity of the proceedings is a valid plea in bar to an action seeking to restrain the sale of bonds of the district, brought by the party constructively served by publication in the proceedings *in rem*, and no alleged defects in the organization can be reviewed in the injunction proceedings. Crall v. Poso Irr. Dist., 87 Cal. 140, 26 Pac. 797 (1890).

4. Obtained by Fraud.

A decree of confirmation procured by fraud upon the court,—e. g., by means of a false affidavit, which stated that notice of the hearing requisite to conferring jurisdiction had been actually given as required by law—may be set aside by a court of equity. People v. Perris Irr. Dist., 142 Cal. 601, 76 Pac. 381 (1904). See Lapham v. Campbell,

property although the negligence of the officers may prevent the collection of such tax. Certainly the railroad company cannot complain if the district failed to assess its property for the years 1902, 1903, and 1904. Such failure did not in any way injure the railway company but was clearly to its benefit; and it cannot be allowed to complain of future legal assessments because of such failure. But as we understand the contention of counsel for respondent, it is that the failure to assess such property for the years 1902, 1903, and 1904 clearly indicates that the district did not intend to make assessments against such property, and that such failure to assess indicates that no benefits were laid against the respondent's property. This argument, however, overlooks the fact that the law determines what property shall be subject to tax in such district, and commits only to the board of directors the duty of determin-

61 Cal. 296 (1882); Dunlap v. Steere, 92 Cal. 347, 28 Pac. 563, 27 Am. St. Rep. 143 (1891); Curtis v. Schell, 129 Cal. 208, 61 Pac. 591, 79 Am. St. Rep. 107 (1900); People v. Perris Irr. Dist., 142 Cal. 601, 76 Pac. 381 (1904). See notes 54 Am. St. Rep. 245, 27 Am. St. Rep. 143.

5. Res Adjudicata.

A judgment and decree in favor of the regularity and validity of the organization of an irrigation district or of the issue of bonds thereof in respect to specified objections made thereto is *res adjudicata* as to the things determined in such former suit within the issues presented to the court (see *ante* III, D, this note), but not in respect to objections not presented to the court in the former action. In re Central Irr. Dist., 117 Cal. 382, 387, 49 Pac. 354 (1897). See *ante* III, D, this note.

K. New Trial.

Under the provisions of section 4 of the California Wright Act, providing that in proceedings to confirm the organization and bonds of an irrigation district, a motion for a new trial must be made upon the minutes of the court, is invalid because, as special legislation, it contravenes Const., art. 4, § 25, subd. 3. Cullen v. Glendora Water Co., 113 Cal. 503, 512, 45 Pac. 822, 1047 (1896). See 39 Pac. 769 (1895).

A new trial may be granted as to a specified issue, and denied as to other issues in proceedings for the confirmation of the organization of an irrigation district and of the issuance and sale of bonds. Directors of Fallbrook Irr. Dist. v. Abila, 106 Cal. 365, 39 Pac. 793 (1895).

L. Right of Appeal.

Under the provisions of the California Confirmation Act (Stats. 1889, p. 212), an appeal from a judgment validating the organization of an irrigation district may be taken within ten days after entry of the judgment, and no notice is required to be given of the entry of the judgment in order to set the time running within which an appeal may be taken. Palmdale Irr. Dist. v. Rathke, 91 Cal. 538, 27 Pac. 783 (1891).

Under the Idaho Irrigation District Laws, any one dissatisfied with the judgment of confirmation of an irrigation district has the right of appeal to the supreme court. Portneuf Irr. Co. Limited v. Budge, 16 Idaho 116, 100 Pac. 1046 (1909).

M. Action to Set Aside.

A judgment and decree confirming the validity and regularity of the organization of an irrigation district and the issue of bonds thereof cannot be attacked collaterally in quo warranto proceedings

ing the benefits and carrying out the clerical provisions as to the method of assessment. So, under the view we take of this case, it can make no difference whether the directors intended to assess such property or not. The law made it their duty to assess all property in the district according to benefits fixed by them under the provisions of the law.

We are clearly of the opinion that under the statute the assessment of benefits to lands within an irrigation district is strictly a proceeding in rem, and that the object and purpose of the statute is to have determined upon an equitable basis, the benefits accruing to the lands within said district as a basis for levying future assessments for maintaining said district; and this without reference to the ownership of such land, and that if in preparing such list it appears that the board have laid the benefits to all the legal subdivisions within said district, then the mere

or otherwise (see *ante* III, J, 2, this note); but an action on behalf of the people may be brought to set aside such judgment and confirmation of the organization of an irrigation district on the ground of fraud. Such action, when brought, is not governed by the limitations in sections 338 and 343 of the California Code of Civil Procedure, but by section 3 of the Wright Act, as amended by Act of March 20, 1891, providing that no action can be commenced or maintained, or defense made affecting the validity of the organization of an irrigation district unless the same shall have been commenced or made within two years after the making of the entry of said order. People v. Perris Irr. Dist., 142 Cal. 601, 76 Pac. 381 (1904).

IV. Attack on District, Bonds, etc.

A. In General.

Under the California Irrigation District Laws, the regularity of the organization of an irrigation district is attackable only by proceedings under the Act of 1889, supplementary to the Wright Act. Miller v. Perris Irr. Dist., 85 Fed. 693, 701 (1898); In re Central Irr. Dist., 117 Cal. 382, 387, 49 Pac. 354 (1897). The decree of confirmation is nothing more than evidence of the validity of the organization, and is conclusive evidence so long as it stands unimpeached. People v. Linda Vista Irr. Dist., 128 Cal. 447, 61 Pac. 86 (1900); People ex rel. Fogg v. Perris Irr. Dist., 132 Cal. 289, 292, 64 Pac. 399 (1901); People v. Perris Irr. Dist., 142 Cal. 601, 76 Pac. 381 (1904). But it is an adjudication only, is no part of the proceedings for the organization, and an attack upon the decree is not an attack upon the validity of the organization. People v. Perris Irr. Dist., 142 Cal. 601, 76 Pac. 381 (1904). The decree of the state court in this regard is binding upon the federal courts. Miller v. Perris Irr. Dist., 85 Fed. 693 (1898).

See *ante* III, D, this note.

B. By District.

In those cases where an irrigation district has been illegally organized and as a *de facto* irrigation district has incurred obligations, the illegality of the organization of the district cannot be pleaded by the district itself for the purpose of avoiding the obligations it has incurred while acting as such district. Herring v. Modesto Irr. Dist., 95 Fed. 705 (1899).

C. By Individual.

The validity of the organization of an irrigation district, reputed to be such, and acting under the forms of law relating to and governing irrigation districts, cannot be attacked under the Wright Act by a private individual,

fact that the board have failed to designate the true owner of such legal subdivisions, or the particular description of fractional parts thereof, but have indicated the ownership of the larger tract of which the smaller may be a part and laid the benefits against the same, the proceedings of the board in determining such benefits will not be declared or held to be void. The fixing and determination of benefits is not the levying of a tax. It is nothing more than the determination of values as a basis for future assessments; and it seems to us that, in determining the question of value, the question of ownership is of no consequence. The railroad company were advised by the law itself that the board of directors must examine all the tracts of land within the district and apportion the costs to the same, and were advised that whatever lands they might own within the limits of such district would be subjected to the proper pro-

either directly or collaterally. Miller v. Perris Irr. Dist., 85 Fed. 693 (1898); Miller v. Perris Irr. Dist., 92 Fed. 263 (1899); Herring v. Modesto Irr. Dist., 95 Fed. 705 (1899).

D. By the People—Quo Warranto.

The decree of court confirming the organization of an irrigation district cannot be assailed in quo warranto proceedings brought by an individual or a public officer on relation of the People; the decree of confirmation of the district theretofore issued is conclusive upon all parties that all the steps necessary for the proper organization of the district had been taken. People v. Linda Vista Irr. Dist., 128 Cal. 477, 61 Pac. 86 (1900); People ex rel. Fogg v. Perris Irr. Dist., 132 Cal. 289, 64 Pac. 399 (1901). See *ante* III, D, this note.

Quo warranto proceedings brought in the name of the people, upon the relation of a private person, to determine whether an irrigation district has a valid and legal existence, and whether its pretended officers are acting without authority of law, is subject to the same rules of law applicable to other litigations, and no injury can come to the state by the dismissal of the action, for the reason that if the defendant corporation is illegally exercising the franchise, the order of dismissal will not be a bar to another action because a wrongful exercise of a franchise is a continuously renewed usurpation on which a new cause of action arises each day. People ex rel. Stone v. Jefferds, 126 Cal. 296, 58 Pac. 704 (1899). See People ex rel. Attorney General v. Stanford, 77 Cal. 360, 18 Pac. 85, 19 Pac. 693 (1888).

On action of quo warranto against an irrigation district charged with usurpation and unlawful exercise of powers and franchise, a bona fide purchaser of the bonds who has been permitted to intervene may avail himself of all the procedure and remedies to which the defendant district was entitled, including an appeal from the judgment rendered against it. People ex rel. Fogg v. Perris Irr. Dist., 132 Cal. 289, 64 Pac. 399 (1901).

E. Collateral Attack.

The organization of an irrigation district under the provisions of the Irrigation District Law, and the proceedings had in that regard, including the determination of the county board as to those matters which are by the statute committed to its consideration, investigation, and determination, and the judgment or decree of confirmation of the organization or of the validity of a bond issue or a bond sale, cannot be collaterally attacked.

United States.—Norton v. Shelby County, 118 U. S. 425, 30 L. Ed. 178,

portion of such cost; and it would be recognizing a technical objection without merit to say that, because the board did not incorporate within the list a minute description of the company's property or name the owner of the same, the company has not been advised of the assessment of benefits to such land. We cannot agree with this contention.

It is also argued by counsel for respondent that section 11 of the act of March 6, 1899, as amended by the laws of 1901 (Laws 1901, p. 194), is unconstitutional, for the reason that such section makes no provision for notice to the landowner of the time when the assessment of benefits will be made. While it is true the statute makes no provision for notice to the landowner that on a particular day the board of directors will proceed to assess benefits to the lands of said district, yet the statute did notify every landowner whose lands were included within said dis-

6 Sup. Ct. 1121 (1886); Miller v. Perris Irr. Dist., 85 Fed. 693 (1898), 92 Fed. 263 (1899); Herring v. Modesto Irr. Dist., 95 Fed. 705 (1899).

California.—People v. La Rue, 67 Cal. 526, 8 Pac. 84 (1885); Crall v. Poso Irr. Dist., 87 Colo. 140, 26 Pac. 797 (1890); Rialto Irr. Dist. v. Brandon, 103 Cal. 384, 37 Pac. 484 (1894); Quint v. Hoffman, 103 Cal. 506, 37 Pac. 514 (1894); People v. Linda Vista Irr. Dist., 128 Cal. 477, 61 Pac. 86 (1900); People ex rel. Fogg v. Perris Irr. Dist., 132 Cal. 289, 64 Pac. 399 (1901); People v. Perris Irr. Dist., 142 Cal. 601, 76 Pac. 381 (1904).

Idaho.—Portneuf Irr. Co. Limited v. Budge, 16 Idaho 116, 100 Pac. 1046 (1909).

Nebraska.—State v. Several Parcels of Land, 80 Neb. 424, 114 N. W. 283 (1907).

Washington.—Rothchild v. Rollinger, 32 Wash. 307, 73 Pac. 367 (1903); Purdin v. Washington Nat. Bldg. Loan & Inv. Assoc., 41 Wash. 395, 83 Pac. 723 (1906).

F. Limitation of Action.

Under the California Law regulating irrigation districts (Cal. Acts, March 7, 1887, § 3, as amended March 21, 1890), an action attacking an irrigation district on the ground of fraud, is barred if not brought within two years after the order of organization is made and entered by the board of county supervisors declaring the district duly organized (Miller v. Perris Irr. Dist., 92 Fed. 263—1899); but it is held that this limitation on the attack of the organization of a district does not apply to suits to annul confirmation. People v. Perris Irr. Dist., 142 Cal. 601, 76 Pac. 381 (1904). In action to confirm, where the statute of limitations is available to the district as a defense, fraud set up on opposition to confirmation may be considered, on the merits, by the court. See *ante* III, I, 2, this note.

V. Officers of—Powers and Duties.

A. In General.

An irrigation district being a *quasi* public municipal corporation (see I, H, 1, this note) its officers are public officers or agents. Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. 56 (1896); Herring v. Modesto Irr. Dist., 95 Fed. 705 (1899); In re Madera Irr. Dist., 92 Cal. 296, 321, 28 Pac. 272, 675, 27 Am. St. Rep. 106, 14 L. R. A. 755 (1891); People v. Selma Irr. Dist., 98 Cal. 206, 208, 32 Pac. 1047 (1893); Quint v. Hoffman, 103 Cal. 506, 37 Pac. 514 (1894); Perry v. Otay Irr. Dist., 127 Cal. 565, 60 Pac. 40 (1900); Board of Directors of Alfalfa Irr. Dist. v. Collins, 46 Neb. 411, 64 N. W. 1086 (1895).

trict, that if the district was organized such lands would be required to bear their equal share of the expenses of said district and the system of irrigation maintained therein; and the law also notified every landowner that the amount of benefits to be assessed had been committed to the determination of the board of directors of such district, and that such board was required to critically examine each tract or legal subdivision of land within said district with a view of determining the benefits which would accrue to the same. The law gave this notice to each landowner, when the notice of the presentation and hearing of the petition was given, and our attention has not been called to any constitutional provision which would prevent the legislature from authorizing the board of directors of an irrigation district to examine and determine the question of benefits, where the landowner had been fully advised and noti-

In all irrigation districts formed under the various statutory proceedings regulating the manner of creating irrigation districts, the officers thereof have such powers and duties as are conferred by the respective statutes under which the district is formed. Crippen v. X. Y. Irr. Ditch Co., 32 Colo. 447, 76 Pac. 794 (1904); Pioneer Irr. Dist. v. Campbell, 10 Idaho 159, 77 Pac. 328 (1904); Settlers' Irr. Dist. v. Settlers' Canal Co., 14 Idaho 504, 94 Pac. 829 (1908); Little Walla Walla Irr. Dist. v. Preston, 46 Or. 5, 78 Pac. 982 (1904); Ryan v. Tutty, 13 Wyo. 122, 78 Pac. 661 (1904).

B. Board of Directors.

1. Generally.

Irrigation districts being *quasi* public municipal corporations, and the officers thereof being public officers or agents, the board of directors of such district do not occupy positions antagonistic to the district; they are merely the agents, and the district is the principal. Tregea v. Modesto Irr. Dist., 164 U. S. 179, 186, 41 L. Ed. 395, 398, 17 Sup. Ct. 52 (1896).

2. Duties and Powers of.

a. Generally.

The duties and powers of the board of directors of an irrigation district are such only as are expressly conferred upon the board, by statute or are impliedly necessary in carrying out the main purposes of the statute under which the district is organized. Stimson v. Allesandro Irr. Dist., 135 Cal. 389, 67 Pac. 496, 1034 (1902); Leeman v. Perris Irr. Dist., 140 Cal. 540, 74 Pac. 24 (1903).

An irrigation district being a municipal public corporation, persons dealing with the board of directors of such district are charged with a knowledge of all the limitations upon the powers of the officers of such district and can acquire any right of action under written instruments entered into in disregard of the statutory requirements. Hughson v. Crane, 115 Cal. 407, 47 Pac. 120 (1896).

b. Under California Laws—Election at Large.

Under the provisions of the amendment of 1891 to the California Wright Act, notice by the board of directors for the election of a new board of five directors by the district at large, is valid and sufficient without dividing the irrigation district into five supervisorial districts for the purposes of such election. Cullen v. Glendora Water Co., 113 Cal. 503, 512, 45 Pac. 822, 1047 (1896). See 39 Pac. 769 (1895).

c. Under Nebraska Laws.

Under the Nebraska Irrigation District Laws (Comp. Laws 1903, c. 993a) the board of directors of an irrigation district may acquire by purchase or condemnation all lands necessary for the construction, use, maintenance, repair, and improvement of canals. Andrews v.

fied of the organization of such district, and the fact that in the process and development of organization one of the steps was the determination of the amount of benefits to the lands in said district. The determination of the question of benefits is not the fixing of a tax. It is merely an appraisement and a fixing of values of the lands of said district as a basis for future assessments; and, as heretofore held in this opinion, the landowner is given an opportunity to contest the question of benefits upon the final hearing for the confirmation of said district. He is thus given full opportunity for his day in court upon all questions involving the legality of the district and the apportionment of the costs according to benefits, as well as the legality and validity of the bonds.

As to the assessment levied for the year 1905, the record in this case shows the following order: "A correction of the assessment roll of the

Lillian Irr. Dist., 66 Neb. 461, 97 N. W. 336 (1893).

And under the Act of 1895 (Laws 1895, c. 70, § 13), requiring the board of directors of the district, as soon as practicable after its organization, to determine the amount of money necessary to be raised, and to call a special election at which shall be submitted the question of issuing bonds in the amount determined, this duty of the board should be performed at once, but failure to act promptly does not relieve the board from its continuing obligation, or nullify the action of the electors in the formation of the district. Baltes v. Farmers' Irr. Dist., 60 Neb. 310, 83 N. W. 83 (1900).

d. Under Oregon Laws.

Under the Oregon District Irrigation Law (Laws 1895, p. 19) the board of directors of the district have power to enter upon land to make surveys and to locate the necessary irrigation works, canals, etc. They may acquire by purchase or condemnation or other lawful means, all lands, water rights, reservoir sites and other property necessary for the construction, use, supply, etc., of the canals and works to be purchased and constructed by the corporation. They may also construct the necessary dams, reservoirs, and works for the collection of water for the district, and do any other lawful act necessary to be done that sufficient water may be furnished to the landowners of the district for irrigation purposes. Little Walla Walla Irr. Dist. v. Preston, 46 Or. 5, 78 Pac. 982 (1904).

e. To Make Plans and Specifications.

Under the various irrigation laws providing for and regulating the formation and management of irrigation districts, the board of directors of an irrigation district are required to make plans and specifications preliminary to the work of construction or of assessment to pay for the construction and installation of the system. Thus, under the California Wright Act the board of directors are required to adopt a plan or plans in the alternative for the acquisition and distribution of water, and for the construction of necessary canals and works before a valid estimate of the money required can be made. Cullen v. Glendora Water Co., 113 Cal. 503, 521, 45 Pac. 822, 1047 (1896). See 39 Pac. 769 (1895). See also Healy v. Anglo-Californian Bank, 5 Cal. App. 278, 90 Pac. 54 (1907). And under the Oregon Irrigation District Law (Laws 1905, p. 19) the board of directors of the irrigation district, after adopting plans for canals, storage reservoirs, and works, shall give notice by public advertisement calling for bids for construction of the same Little Walla Walla Irr. Dist.

district having been completed, which said assessment roll shows the value of the assessable property of the district to be $214,376.67, and the board having before it a statement of the estimated expenditures for the care, operation, management, and improvement for the fiscal year beginning July 1, 1905, and ending June 30, 1906, which statement is on file in this office * * * it is hereby ordered that there be and is hereby levied and assessed at the rate of seven and one-half per centum against each and every dollar of the said $214,376.67, the assessed valuation of the district for said maintenance purposes, which assessment is to be listed and carried out and entered in the proper book by the secretary and delivered to the treasurer of the district for collection. It further appearing that the amount of interest accruing on the bonds of the district for the ensuing year, * * * it is hereby ordered that there be and is

v. Preston, 46 Or. 5, 78 Pac. 982 (1904). And under all the laws, such notice calling for bids for construction work must describe the work substantially according to the plans and specifications. Healy v. Anglo-Californian Bank, 5 Cal. App. 278, 90 Pac. 54 (1907).

Where, in compliance with the particular statute under which an irrigation district is organized, surveys, plans, specifications, and maps have been duly made, upon which there has been an issuance of bonds and the system of irrigation has been constructed in part, and the proceedings from the bonds are inadequate for the completion of the construction and installation of the system a new bond issue may be authorized without further or new plans and specifications being procured by the board of directors. Pioneer Irr. Dist. v. Campbell, 10 Idaho 159, 77 Pac. 328 (1904).

Where the statute under which an irrigation district is organized provides for the preparation of plans and specifications, etc., as the basis for a bond issue, and an irrigation company may contract with an engineer to furnish plans for the construction of a proposed canal, from which the board of directors of the district may estimate the cost thereof and the amount of bonds to be voted therefor. Such work is preliminary to the work of construction, and is not to be paid for out of the construction fund. Willow Springs Irr. Dist. v. Wilson, 74 Neb. 269, 104 N. W. 165 (1905).

C. Collector.

The collector of an irrigation district, acting as such, is a *de facto* officer of the district and need not prove that he was duly elected where his right to the office is not called in question. Baxter v. Vineland Irr. Dist., 136 Cal. 185, *sub nom.* Baxter v. Dickinson, 68 Pac. 601 (1902). The salary of such collector and his commissions and expenses in litigation to enforce the collection of assessments levied by the district can be paid out of the treasury after due allowance by the board only, and upon a warrant properly drawn therefor; the collector cannot offset against assessments collected by him, which are a public fund, his claim for salary, commissions, and expenses in litigation and enforcement of the collection of assessments. Perry v. Otay Irr. Dist., 127 Cal. 565, 60 Pac. 40 (1900).

D. Treasurer.

The treasurer of an irrigation district has such duties to perform as are imposed on him by the provisions of the statute under which the irrigation district is formed; and among such duties of the treasurer is that to pay the interest coupons upon the bonds issued

hereby levied at the rate of seven and one-half per centum against each and every dollar of the said * * * the assessed valuation of the district, for the purpose of paying said interest, which assessment is to be listed, carried out, and entered in the proper book and delivered to the treasurer for collection. It further appearing that the warrants in the redemption list of the district amount to the sum * * * it is hereby ordered that there be and hereby is levied and assessed against each and every dollar of the said, etc. * * * It further appearing that in addition to the foregoing estimated expenditures * * * there be and hereby is levied and assessed a toll in the sum of one dollar against each and every lot within the limits of the said cities of Caldwell and Nampa."

The record then shows that the parties stipulated that the description contained in the complaint and set out in the notice of sale for delinquent

by the district; this duty is one resulting from an office or station of trust. But the personal liability of the treasurer for interest on interest coupons attached to bonds issued by the district for failure to pay such coupons on presentation cannot be enforced by mandamus. Hewel v. Hogin, 3 Cal. App. 248, 84 Pac. 1002 (1906).

E. Superintendent of Irrigation Company.

A superintendent of irrigation, elected by the voters of an irrigation district organized in certain portions of a county, the functions of whose office are to be exercised only in such portions of the county where the district is organized, is an officer of such district, and not of the county. Knox v. Los Angeles County, 58 Cal. 59.

F. Salaries of.

1. Generally.

The salaries of officers and the expenses of conducting an irrigation district are to be paid out of the fund provided for that purpose by the law under which the district is organized, and any fund created by such statute from a particular source cannot be diverted from the application which the statute makes of such fund. Miller v. Patterson, 120 Cal. 286, 52 Pac. 589 (1898). See *ante* II, E, this note.

A fund derived wholly from tolls and charges fixed by the board of directors of the district upon consumers of water, using the pipes and canals of a district, is a part of the general fund of a district, applicable to the payment of salaries of employees and other expenses provided for in section 37 of the Wright Act, where those salaries and expenses are not otherwise provided for, and the fact that the fund is carried on the books of the irrigation district as "the water fund" in no wise affects its character as a general fund. Mitchell v. Patterson, 120 Cal. 286, 52 Pac. 589 (1898).

2. Mandamus to Enforce.

In an action against an irrigation district to enforce the payment of salary, a misnomer in regard to the name of the president of an irrigation district in findings, judgment and statement on appeal, in mandamus proceedings to compel the payment of warrants issued to a former officer of the district for salary accrued and unpaid during his incumbency, where the name of the president is accurately set forth in the complaint, is a mere clerical error which may be corrected by order, upon the court's attention being called to it. Mitchell v.

taxes is the description of the right of way of the plaintiff company as contained upon the assessment roll for the year 1905, and is an exact copy of the assessment roll so far as the description is concerned. The description thus referred to, as it appears in the complaint and in the delinquent notice, is as follows:

Idaho Central R. R., lots 7 and 8, blk. 87; lots 2 to 6 and 9 to 12, blk. 98; lots 7 and 8, blk. 90, Nampa G. & K..... $10.94

O. S. L. R. R. Beginning at intersection of center line of track and north line SW 1-4 NW 1-4, sec. 22-3-2, thence northwesterly a strip of land 200 ft. wide lying 100 ft. each side of center line of O. S. L. track, through sec. 22, 21-16, 17, 8, 7, 6, Tp. 3 N. R. 2 W.; sec. 1, 3, 3; sec. 36, 35, 26, 27, 22, Tp. 4 N. R. 3 W.; to intersection with N. line SW on quarter sec. 22-4-3-186, 3A.....$331.55

A number of other descriptions similar to the above follow. The question arises, Was this a compliance with the statute?

Patterson, 120 Cal. 286, 52 Pac. 589 (1898).

VI. Bonds of.

A. In General.

The court will take judicial notice of the financial history of the bonds of an irrigation district. Hughson v. Crane, 115 Cal. 404, 47 Pac. 120 (1896).

Where the secretary's name is lithographed on the coupons of the bonds of an irrigation district, but the bonds are not signed by him, as required by the irrigation district law, the bonds are void. Wright v. East Riverside Irr. Dist., 138 Fed. 313 (1905).

Where lands have been excluded from a district, or a landowner has waived his right to the use of water from the district in accordance with the provisions of the law under which an irrigation district is formed, his lands will not be liable for the bonds issued by the district, or the interest thereon, and cannot be assessed for the payment of either. Nampa & M. Irr. Dist. v. Brose, 11 Idaho 474, 83 Pac. 499 (1905). See *post* VI, O, and VII, L, N, 2, this note.

B. Attack on.

1. Generally.

The regularity and the validity of the issue of bonds by an irrigation district issued under the provisons of the Wright Act can be attacked only under the provisions of that act. Miller v. Perris Irr. Dist., 85 Fed. 693, 701 (1898); In re Central Irr. Dist., 117 Cal. 382, 387, 49 Pac. 354 (1897). Where it is not shown that the bonds issued by an irrigation district are in the hands of bona fide holders, they may be declared invalid on proper showing made. Hughson v. Crane, 115 Cal. 404, 47 Pac. 120 (1896); Baxter v. Vineland Irr. Dist., 136 Cal. 185, 190 (1902), *sub nom.* Baxter v. Dickinson, 68 Pac. 601 (1902). A void bond issue cannot be confirmed. See *ante* III, G, 3, this note.

2. Action to Cancel.

a. Generally.

A landowner and taxpayer within an irrigation district may maintain an action on behalf of himself and other landowners similarly situated for the cancellation of bonds of the irrigation district which have been illegally issued, and to enjoin further issue of such bonds, and to enjoin the levy of assessments to pay annual interest on the bonds already issued, and may make the district and the board of directors parties defendant to the action. Sechrist v. Rialto Irr. Dist., 129 Cal. 640, 62 Pac. 261 (1900).

b. Complaint, Allegations in.

In an action by a landowner and tax-

Section 26 of the act under consideration provides: "At its regular meeting in October the board of directors shall levy an assessment upon the basis as determined in the manner provided in section eleven of this act, sufficient to raise the annual interest on the outstanding bonds. * * * The secretary of the board must compute and enter into a separate column of the assessment book the respective sums, in dollars and cents, to be paid as an assessment on the property therein enumerated."

It will thus be seen that the order of the board levying such assessment embraces within its terms every act required by the statute to be done by the board in levying such assessment, and that the assessment roll was made up and contained every fact required to be stated therein by this statute. The order of the board directed: "Which assessment is to be listed and carried out and entered in the proper book by the

payer within an irrigation district to have canceled bonds issued by the district under an illegal order, he need not allege in his complaint or show on the trial that he made a previous demand on the district to bring such action. Sechrist v. Rialto Irr. Dist., 129 Cal. 640, 62 Pac. 261 (1900); and he need not aver in his complaint or show on the hearing a tender of restitution by himself or by the district of the consideration received by the district for such bonds. Miller v. Perris Irr. Dist., 92 Fed. 263 (1899); Sechrist v. Rialto Irr. Dist., 129 Cal. 640, 62 Pac. 261 (1900). See Divine v. Board of Supervisors, 121 Cal. 670, 54 Pac. 262 (1898); Chase v. Los Angeles, 122 Cal. 540, 55 Pac. 414 (1898).

In an action to cancel bonds issued by an irrigation district under the Wright Act, which could not be legally issued for labor, alleging that the bonds were issued in payment for labor and materials, it is sufficient to show the invalidity of the bond issue. Miller v. Perris Irr. Dist., 92 Fed. 263 (1899).

c. Limitation of Action.

In an action to cancel the bonds of an irrigation district, where any part of the cause of action is not barred by the statute of limitations, a demurrer setting up the statute is properly overruled. Sechrist v. Rialto Irr. Dist., 129 Cal. 640, 62 Pac. 261 (1900). The statute of limitations against an action to cancel bonds of an irrigation district does not run from the date of the order for the issuance of the bonds, but only from the date of the delivery of the bonds for a valuable consideration. Sechrist v. Rialto Irr. Dist., 129 Cal. 640, 62 Pac. 261 (1900). As to the statute of limitations in such actions, see *ante* IV, F, this note.

3. Action to Annul Tax Sale, etc.

An action brought by a landowner and taxpayer of an irrigation district to annul the sale of his lands for the purpose of paying interest on bonds of the district, and to annul the bonds, is a collateral attack upon said bonds. Baxter v. Vineland Irr. Dist., 136 Cal. 185 (1902), *sub nom.* Baxter v. Dickinson, 68 Pac. 601 (1902). As to collateral attack, see *ante* III, J, 2, and IV, E, this note. The owners of the outstanding bonds are proper parties to such an action and may intervene and defend. Baxter v. Vineland Irr. Dist., 136 Cal. 185 (1902), *sub nom.* Baxter v. Dickinson, 68 Pac. 601 (1902).

C. Bona Fide Purchasers.

1. Generally.

The general rule is that bona fide purchasers of bonds which recite that they are issued pursuant to law, are not re-

secretary and delivered to the treasurer of the district for collection." This duty was performed by the secretary in accordance with the direction of the board and the provisions of the statute. Cooley on Taxation, p. 745, states the rule as follows: "The designation of the land will be sufficient if it afford the owner the means of identification and do not positively mislead him or is not calculated to mislead him." In discussing the sufficiency of the description of land, when listed for taxation, the Supreme Court of California in the recent case of Best v. Wohlford, 144 Cal. 733, 78 Pac. 293, says: "The strictness of construction which at one time prevailed in matters of taxation has been greatly relaxed in modern days. The obligation of all citizens to contribute to the expenses of government is recognized, and instead of regarding proceedings for the levying and collection of taxes as hostile to the property

quired to look farther, such recital being sufficient evidence. Baxter v. Vineland Irr. Dist., 136 Cal. 185 (1902), *sub nom.* Baxter v. Dickinson, 68 Pac. 601 (1902). But this rule does not apply in those cases where the purchaser of the bonds had actual knowledge of a fact which, in connection with the statute, establishes the irregularity of the issue. Leeman v. Perris Irr. Dist., 140 Cal. 540, 74 Pac. 24 (1903). The reason for this exception is that the board of directors of an irrigation district, which is a *quasi* public municipal corporation (see *ante* I, H, 1, this note), have only such powers as are expressly conferred upon them by statute or impliedly necessary to carry out the purposes of the irrigation law. Stimson v. Allesandro Irr. Dist., 135 Cal. 389, 67 Pac. 496, 1034 (1902); Leeman v. Perris Irr. Dist., 140 Cal. 540, 74 Pac. 24 (1903). See *ante* V, B, 2, a, this note. And all persons dealing with such board of directors are charged with a knowledge of the limitation upon their power, and can acquire no right of action under written instruments entered into in disregard of the statutory requirements. Hughson v. Crane, 115 Cal. 404, 47 Pac. 120 (1896).

Where bonds issued by an irrigation district are within the authority of the board of directors and not *ultra vires*, and recite that they were issued in pursuance of a certain act, and the only question presented is as to irregularities in keeping the records and conducting the bond election which authorized the issue of the bonds, a bona fide purchaser without notice of such irregularities has the right to presume that the bonds are a legal obligation of the district without inquiring into the regularity of the keeping of the records of the district, or the regularity in conducting the election voting the bonds and the advertising of the bonds for sale, and will be protected against any mere irregularities in these regards in the proper exercise of a granted power. Baxter v. Vineland Irr. Dist., 136 Cal. 185 (1902), *sub nom.* Baxter v. Dickinson, 68 Pac. 601 (1902).

Whether a bona fide holder of the bonds of an irrigation district illegally issued at ninety per cent. of their face value to a contractor in payment for work done by him, could be enforced by him against the district, or whether the district would be liable for the interest upon any of the bonds thus illegally disposed of, under the California Wright Act, *quaere.* Hughson v. Crane, 115 Cal. 404, 47 Pac. 120 (1896). But he may recover consideration therefor. See *post* VI, C, 2, and VIII, C, 1, this note.

2. Recovery of Consideration.

A bona fide holder of irrigation bonds

owner, he is considered to be interested equally with all other citizens in the prompt collection of the taxes. A tax properly imposed upon his property will be upheld if the description of the property is sufficient to give him notice that it is burdened with the tax."

It is next contended that the district has no power or jurisdiction to assess the property of the respondent; that such property can only be assessed by the state board of equalization. The power and jurisdiction of the state board of equalization depends wholly upon the authority given it by statute; and we are unable to find any provision of the statute which gives to the state board of equalization the power or jurisdiction to assess railroad property or other corporate property within an irrigation district. The power and jurisdiction as given to the state board of equalization by the statute has reference to assessments made

which were illegally issued by the district, who desires to have the consideration paid therefor restored by the district, must allege in his complaint and prove on the trial facts which will entitle him to such restoration. Miller v. Perris Irr. Dist., 92 Fed. 263 (1899). See *post* VIII, C, 1, this note.

The holder of bonds who took them with knowledge that they had been issued in violation of the statute in exchange for water-right certificates, or for warrants given in payment of claims for labor and salaries, cannot recover the consideration paid therefor. Leeman v. Perris Irr. Dist., 140 Cal. 540, 74 Pac. 24 (1903). See *post* VI, H, this note.

D. Confirmation Proceedings.

1. Generally.

Proceedings for the confirmation of the bond issue of an irrigation district are provided for by the various statutes under which the irrigation districts are organized; such proceedings are proceedings *in rem* the same as proceedings for the confirmation of the organization of the district (see *ante* II, D, this note), and the judgment is binding accordingly. Perris Irr. Dist. v. Thompson, 116 Fed. 832, 836 (1902); Modesto Irr. Dist. v. Tregea, 88 Cal. 334, 26 Pac. 237 (1891); Cullen v. Glendora Water Co., 113 Cal. 503, 512, 45 Pac. 822, 1047 (1896). See 39 Pac. 769 (1895); People v. Linda Vista Irr. Dist., 128 Cal. 477, 481, 61 Pac. 86 (1900). The object of such proceedings is to establish the validity of the bonds as against the irrigation district and all persons interested therein, and would be effective for the protection of investors, and the judgment must bind not only the parties appearing, but the whole world. Modesto Irr. Dist. v. Tregea, 88 Cal. 334, 26 Pac. 237 (1891). In such proceedings under the statute to obtain judgment of confirmation and approval of the issuance of bonds, the presumptions and rules of construction which apply in a collateral attack upon the bonds after they have been issued and confirmed, have no application; the plaintiff district is required to show every essential fact to the establishment of the issues presented for determination. Directors of Fallbrook Irr. Dist., v. Abila, 106 Cal. 365, 39 Pac. 793 (1895). See *post* VI, D, 6, this note.

2. Board of Directors May Bring Action.

The board of directors of an irrigation district, as the legal representatives thereof, may file a petition in pursuance of the statute under which the district is organized, to have a bond issue theretofore issued confirmed (see *ante* III, E, this note); and under the Idaho Laws (Laws 1903, p. 150) such proceed-

for general state, county, and municipal purposes. The assessment made by the board of directors is simply fixing the rate necessary and required to raise revenue required by the district as apportioned to the lands of the district, according to benefits. The principle involved in assessments for local improvements is different from that underlying general taxation. The organization of the district, in the first instance, was intended for local improvement, and the assessment levied is for the purpose of carrying out the local improvement; and we do not understand the rule to be that the general method of fixing values and making assessments against property for general tax purposes applies to levies made for local improvements. As said by the Supreme Court of California in the case of Turlock Irr. Dist. v. Williams, 76 Cal. 360, 18 Pac. 379: "Nor does it follow that the method of assessments, and

ings may be confirmed where the said bonds or any of them have been sold at the time of the commencement of such proceedings. Nampa & M. Irr. Dist. v. Brose, 11 Idaho 474, 83 Pac. 499 (1905).

3. Landowner May Bring Action.

Any landowner within an irrigation district interested in the price to be realized on the sale of the bonds thereof has a right to insist that the required steps to give the court jurisdiction to pronounce a binding degree be regularly taken, and to this end may become an actor. Modesto Irr. Dist. v. Tregea, 88 Cal. 334, 26 Pac. 237 (1891).

4. Notice.

In order that the proceedings for the confirmation of the bond issue of an irrigation district shall be valid under the California Act (Stats. 1889, p. 212), there is required the publication of a notice of the filing of the petition, and this notice, where properly given, is sufficient to give the court jurisdiction to render a judgment affirming the legality of the organization of the district and the legality and validity of its ordinance for the issuance of its bonds, and such judgment will be binding upon the lands of the district and the owners thereof. Modesto Irr. Dist. v. Tregea, 88 Cal. 334, 26 Pac. 237 (1891).

In those cases where the original petition is amended after the first publication and before the hearing to confirm the bonds, by setting out other orders for the issue or sale of bonds, but not referred to in the original petition, the publication of a new notice is required to give the court jurisdiction. Modesto Irr. Co. v. Tregea, 88 Cal. 334, 26 Pac. 237 (1891).

5. Petition and Prayer.

The prayer to the petition for the confirmation of the validity of bonds ordered and issued by an irrigation district must be read in connection with the petition itself in order to understand its meaning, and if it be for the judicial examination, approval and confirmation of all the proceedings set out in the petition, it includes those for the organization of the district, for they, like the rest, are essential to the legality and validity of the bonds. Modesto Irr. Dist. v. Tregea, 88 Cal. 334, 26 Pac. 237 (1891). See *ante* III, G, 2, this note.

6. Burden of Proof.

In a proceeding for the confirmation of the bond issue of an irrigation district the board of directors or the party petitioning is the actor in the case, and has the burden of proof of the issues upon which the petition asks the judgment of the court. In re Madera Irr. Dist., 92 Cal. 296, 330, 339, 28 Pac. 272,

their collection, adopted, must be assimilated to, and follow exactly, the mode provided in the Constitution for the assessment and collection of taxes for general state purposes. The nature of the assessment is one for local improvements, which, however, eventuate in the advancement of the public good, and such assessments and collections can be lawfully made. It is 'clear that those clauses of the Constitution which provide that taxation shall be equal and uniform, and which prescribe the mode of assessment, and the persons by whom it shall be made, and that all property shall be taxed, have no application to assessments levied for local improvement.'" The legislature, in providing for the valuation and taxation of telegraph, telephone, and railroad tracts, had reference only to assessments made for general state, county, and municipal purposes, and did not have in mind or contemplate assessments made for

675, 27 Am. St. Rep. 106, 14 L. R. A. 755 (1891); Fallbrook Irr. Dist. v. Abila, 106 Cal. 365, 39 Pac. 793. See *ante* III, I, 3, this note.

7. Decree.

In an application on notice duly given for the confirmation of the bond issue of an irrigation district, based on petition required by the statute, an inquiry into the validity of the original organization of the district is necessarily involved, and the confirmatory decree may adjudge the validity of the organization of the district without special prayer in that behalf. Fogg v. Perris Irr. Dist., 154 Cal. 209, 217, 97 Pac. 316 (1908). See III, G, 2, this note. The decree is *res adjudicata* and binds the whole world. See *ante* III, D, this note. Where a decree confirming the validity of proceedings for the issue of bonds is partly valid and partly void, its invalidity will not affect the validity of that portion of the decree in which the court had jurisdiction to pronounce judgment and enter its decree. Modesto Irr. Co. v. Tregea, 88 Cal. 334, 26 Pac. 237 (1891).

E. Coupons, Payment of.

The interest coupons attached to bonds issued by an irrigation district are payable out of the fund and in the manner provided by the law under which the district is organized, and the holders of the bonds are entitled to have the moneys collected for the payment of the interest coupons applied to that purpose. The methods of enforcement of this right are treated in *post* VI, K, 1, 2, this note.

F. Date of Issue.

The date of issue of the bonds of an irrigation district may become important in determining the validity of such issue, particularly where that date shows that the bonds were issued to run for a longer or a shorter term than that provided by the statute under which they were issued (see *post* VI, Q, this note); and where such bonds are antedated, and not signed by the person who was secretary of the irrigation district at the time of the supposed issue thereof, as required by law, they are void. Wright v. East Riverside Irr. Dist., 138 Fed. 313 (1905).

In determining the effect and legality of such bonds, the entire instrument must be considered. Thus where irrigation bonds bore date of November 17, 1890, and the first payment of semi-annual interest fell due on July 1, 1891, and the instalments of principal were made payable in the required number of years after January 1, 1891, the date from which they began to bear interest, the bonds are to be regarded in effect as having been issued on January 1, 1891, which may be treated as their real date, instead of the nominal date of November

local improvements; and such, necessarily, is true for the reason that the assessments for local improvements necessarily must depend upon the benefits accruing to the property assessed; and it would be impracticable for the state board of equalization to determine, at its stated and regular meetings as fixed by law, the question of benefits accruing or to accrue by reason of local improvements.

While section 12, art. 7, of the Constitution, creates the state board of equalization, yet the duties of such board are left to the legislature to prescribe, and the duties thus prescribed by the legislature have to do with the assessment of railroad property for general taxation purposes. Section 6 of the same article provides that "the legislature shall not impose taxes for the purpose of any county, city, town, or other municipal corporation, but may by law invest in the corporate authori-

17, 1890; and execution and issuance of the bonds in this form and manner is a substantial compliance with the statute both as to date and term of running. Stowell v. Rialto Irr. Dist., 155 Cal. 215, 100 Pac. 248 (1909). See Flagg v. City of Palmyra, 33 Mo. 440 (1863); State v. Moore, 46 Neb. 590, 65 N. W. 193, 50 Am. St. Rep. 626 (1895); Yesler v. City of Seattle, 1 Wash. St. 308, 25 Pac. 1014 (1891); Rock Creek Township v. Strong, 96 U. S. 271, 24 L. Ed. 815 (1877); Dows v. Town of Elmwood, 34 Fed. 114 (1888); South St. Paul v. Lamprecht Bros. Co., 88 Fed. 449 (1898).

G. De Facto District.

The bonds issued by a *de facto* irrigation district are valid in the hands of innocent purchasers for value. See *ante* I, F, this note.

H. Disposition of, Methods of

1. California Statute.

Under the California Wright Act, and the amendments thereof, the only method in which the board of directors of an irrigation district can dispose of the bonds voted by the district is in the manner provided by the statute, which is either (1) to exchange them for property purchased for construction purposes at their par value under the provision of section 12, and (2) to sell them for money in the open market, under the restrictions and limitations of section 16 of that act, at not less than ninety per cent. of their face value; they cannot (3) exchange them for any other purpose, or make payments with them at ninety per cent. of their face value in discharge of any obligation of the district, or (4) dispose of the bonds or the moneys received from a sale thereof for any other object than to provide for the construction fund contemplated by the act. Hughson v. Crane, 115 Cal. 404, 47 Pac. 120 (1896); Stowell v. Rialto Irr. Dist., 155 Cal. 215, 100 Pac. 248 (1909). Thus, they cannot deliver bonds to a contractor in payment for construction work done by him for the district (Hughson v. Crane, 115 Cal. 404, 47 Pac. 120—1896; Leeman v. Perris Irr. Dist., 140 Cal. 540, 74 Pac. 24—1903), or for warrants given in payment of claims for labor and salaries. Leeman v. Perris Irr. Dist., 140 Cal. 540, 74 Pac. 24 (1903). While the board of directors may, under the provisions of section 12, issue and turn over the bonds, at their par value, in payment for property acquired (Stowell v. Rialto Irr. Dist., 155 Cal. 215, 100 Pac. 248—1909), they are not authorized to make a contract with a water company whereby the district issues all its bonds in consideration of the mere executory promises of the water company that it will in the future lease water to the

ties thereof, respectively, the power to assess and collect taxes for all purposes of such corporation;" and section 8 of the same article provides: "The power to tax corporations or corporate property, both real and personal, shall never be relinquished or suspended, and all corporations in this state or doing business therein, shall be subject to taxation for state, county, school, municipal, and other purposes, on real and personal property owned or used by them, and not by this Constitution exempted from taxation within the territorial limits of the authority levying the tax." Yet, while the Constitution creates the state board of equalization, it also authorizes the legislature to invest in counties, cities, towns, or other municipal corporations the power to assess and collect taxes, and also provides that the power to tax corporate property shall never be relinquished or suspended; and that all corporations in this

district at a stipulated rental. Steinson v. Allesandro Irr. Dist., 135 Cal. 389, 392, 393, 67 Pac. 496, 1034 (1902); Leeman v. Perris Irr. Dist., 140 Cal. 540, 74 Pac. 24 (1903). The provisions of section 15 of the Wright Act are merely directory as to the method in which bonds are to be disposed of, leaving the matter entirely in the discretion of the board of directors. Modesto Irr. Dist. v. Tregea, 88 Cal. 334, 26 Pac. 237 (1891). The directors need not personally sell the bonds; this may be done by another under their direction. See Brownell v. Town of Greenwich, 114 N. Y. 518, 22 N. E. 24, 4 L. R. A. 685 (1889). But the board of directors has no power to turn over the bonds to an agent to be sold by him at less than ninety per cent. of their par value. Hughson v. Crane, 115 Cal. 404, 47 Pac. 120 (1896); Stowell v. Rialto Irr. Dist., 155 Cal. 215, 100 Pac. 248 (1909). The express provisions of section 12, giving to the board power to exchange the bonds of the district at their par value for certain property, excludes the right of the board to exchange them for any other purpose or to dispose of them in any other manner than by sale as authorized by section 16. Hughson v. Crane, 115 Cal. 404, 47 Pac. 120 (1896); Stowell v. Rialto Irr. Dist., 155 Cal. 215, 100 Pac. 248 (1909).

Where bonds of an irrigation district have been illegally issued in exchange for water-right certificates, or for warrants given in payment of claims for labor and salaries, an action cannot be maintained upon such bonds by a plaintiff who knew when he took the bonds that they were so issued in violation of statute. Leeman v. Perris Irr. Dist., 140 Cal. 540, 74 Pac. 24 (1903). As to right to recover consideration paid therefor, see *ante* VI, C, 2, and *post* VIII, C, 1, this note.

2. Nebraska Statute.

Under the Nebraska Irrigation Laws (Laws 1895, c. 70, § 10) the board of directors of an irrigation district have the right to use the bonds issued by the district at their par value, instead of the proceeds thereof, in acquiring or constructing irrigation ditches or canals. Baltes v. Farmers' Irr. Dist., 60 Neb. 310, 83 N. W. 83 (1900).

3. Washington Statute.

It is held that under the Washington Statute (Sess. Laws 1889—90, p. 671; Laws 1895, p. 432) where an irrigation district issues bonds for the purpose of constructing the irrigation system under contract with a person to pay a certain sum therefor, who is unable to carry out the agreement, the board of directors may deliver the same to the

state shall be subject to taxation for state, county, school, municipal, and other purposes within the territorial limits of the authority levying the tax. The legislature, therefore, having provided for the organization of an irrigation district, and giving the power to such district to levy assessments within the territorial limits of the same, vested such district with the power to levy assessments for such local improvement, and such legislation was clearly authorized by the provisions of the Constitution. This question is fully discussed and the authorities reviewed in the recent work of Page & Jones on Taxation by Assessment, vol. I, c. 5.

One other question remains for consideration. The trial court found that the town lots in Nampa were not and never had been made a part of the Pioneer Irrigation District, and this finding, we think, is fully supported by the evidence. The record shows that on the 7th day of

contractor who did the work. Kincade v. Witherop, 29 Wash. 10, 69 Pac. 399 (1902).

I. Election for Bond Issue.

1. Generally.

The various statutes governing the organization of irrigation districts provide for an election to determine whether bonds shall be issued for the purpose of constructing the necessary irrigation canals and works and acquiring the necessary property therefor, and for assessments upon all lands in the district of a tax sufficient to pay all charges and expenses and all obligations incurred by virtue of the issuance of any bonds by said district. See Little Walla Walla Irr. Dist. v. Preston, 46 Or. 5, 78 Pac. 982 (1904).

In the conducting of these elections where the board of supervisors, in canvassing the votes, merely recite the vote which had been cast, without making any entry in the record declaring the results, this is not in compliance with the requirement of the statute, which specifies that the result of the election shall be "declared and entered of record." Directors of Fallbrook Irr. Dist. v. Abila, 106 Cal. 365, 39 Pac. 793 (1895).

The clerk of the board of directors of an irrigation district cannot, without direction of the said board, amend the record of the canvassing of an election for the issuance of bonds by inserting therein of his own accord a record of the declared result of the said election. Directors of Fallbrook Irr. Dist. v. Abila, 106 Cal. 365, 39 Pac. 793 (1895).

2. Notice.

Under the provisions of section 16 of the Wright Act there is required to be given a notice of the special election for the purpose of issuing bonds and this notice may be given under the provisions of that section to the exclusion of the provisions of section 5 of the same act, which requires a posting in the office of the board of a general notice. Modesto Irr. Dist. v. Tregea, 88 Cal. 334, 26 Pac. 237 (1891).

Notice of election called for the purpose of issuing bonds directing the opening and closing of the polls either earlier or later than the time fixed by the statute, and allowing persons to vote at the election either before or after the time fixed by statute, renders the election nugatory. Directors of Fallbrook Irr. Dist. v. Abila, 106 Cal. 365, 39 Pac. 793 (1895). But see *ante* II, B, 8, d, this note.

3. Second Election.

Where an irrigation district which has been duly organized, in constructing

June, 1902, a petition was filed with the secretary of the district praying that said town lots in the town of Nampa be taken into and included within the boundaries of the district. The record shows the petition was referred to the attorney of the district. He made his report thereon, and thereafter the petition was granted, and the territory ordered included within said district. It appears, however, and counsel for appellant admit, that the notice required by the statute of the presentation of such petition was not given, and that the order admitting the proposed territory did not set out the description of the boundaries as changed, and that no record of the boundaries as changed properly certified was filed in the office of the county recorder. Counsel for appellant admit that these defects would nullify the action of the

works as laid out by the surveys, maps, plans and specifications previously adopted, has exhausted the receipts from the sale of bonds originally issued, and the works are not yet completed, the said surveys, maps, etc., having been duly made in accordance with the requirements of section 15 of the Idaho Irrigation Act (Sess. Laws 1903, p. 165), it is unnecessary that there shall be a new survey and additional maps and plans before another election can be called for a further bond issue to complete the works. Pioneer Irr. Dist. v. Campbell, 10 Idaho 159, 77 Pac. 328 (1904).

J. Exclusion of Territory.

Where an irrigation district has been duly organized, the subsequent exclusion of territory therefrom under the provisions of the statute governing, does not affect the validity of bonds theretofore issued. Herring v. Modesto Irr. Dist., 95 Fed. 705 (1899).

K. Procedure to Enforce.

1. Action at Law.

In an action at law to recover on the bonds of an irrigation district or on the interest coupons thereof, the question whether the district has derived any benefit from the improvement is immaterial and constitutes no defense. Herring v. Modesto Irr. Dist., 95 Fed. 705 (1899).

Where coupons attached to the bonds of an irrigation district issued in pursuance of the California Wright Act (Stats. 1887, p. 29), made payable under that law at the office of the treasurer of the district, are not paid on presentation to the treasurer, the holder thereof may bring suit thereon without a demand on the treasurer of the county in which the office of the irrigation district treasurer is situated, notwithstanding the provision of the law that on the failure of the board of directors of the irrigation district to levy an assessment to meet such coupons, it becomes the duty of the county officials to levy a tax therefor, the collection of which devolves upon the county treasurer. Shepard v. Tulare Irr. Dist., 94 Fed. 1 (1899), affirmed in 185 U. S. 1, 46 L. Ed. 773, 22 Sup. Ct. 531 (1902); Herring v. Modesto Irr. Dist., 95 Fed. 705 (1899).

Under the federal rule, the procedure for the holder of irrigation district bonds which, or the coupons thereof, are not paid, or on which payment is refused, is to sue at law and by judgment of the court establish the validity of the claim and the amount due, and by the return of an ordinary execution ascertain that no property of the district can be found liable to such execution and sufficient to satisfy the judgment; and then by proceedings in mandamus compel the levy of an assessment sufficient to meet the obligation. Shepard v. Tulare Irr.

board in their efforts to incorporate and include within said district that portion of Nampa set out in the record; and we believe that the admission of counsel for appellant is correct. These matters are statutory and jurisdictional, and it was just as necessary that the statute be followed in these jurisdictional matters in changing the boundaries of a district, as creating the district in the first instance. But counsel for appellant contend that inasmuch as this objection has not been raised until long years after the district was incorporated, and, the boundaries having been acquiesced in by the people generally, and the people having accepted the assessments levied and paid the same, that it is too late to now raise the question.

This argument is based upon the case of State v. Steunenberg, 5 Idaho 1, 45 Pac. 462, in which the validity of the incorporation of the city of Caldwell was involved, and in which case the court held that the in-

Dist., 94 Fed. 1 (1899), affirmed in 185 U. S. 1, 46 L. Ed. 773, 22 Sup. Ct. 531 (1902). See Waite v. Santa Cruz, 89 Fed. 619 (1898); Heine v. Levee Commissioners, 86 U. S. (19 Wall.) 655, 22 L. Ed. 223 (1873). See *post* VI, K, 2, b, this note.

2. Mandamus.

a. To Compel Payment.

In those cases where the bonds and interest coupons of an irrigation district have not been refunded, the holders of the bonds issued are entitled to have the money collected for the payment of the interest thereon so applied, which right cannot be defeated by a transfer of the fund to other purposes, and mandamus will issue to compel the treasurer of the irrigation district to pay the interest coupons issued by such district. Hewel v. Hogin, 3 Cal. App. 248, 84 Pac. 1002 (1906). See Mitchell v. Patterson, 120 Cal. 286, 52 Pac. 589 (1898); Meyer v. Widber, 126 Cal. 252, 58 Pac. 532 (1899); Rutherford v. Hudson River Traction Co. (N. J. L.), 63 Atl. 84 (1906).

On hearing of a petition for mandamus to compel the treasurer to pay interest coupons, where the law makes such interest payable out of a fund to be provided by assessments by the board of directors, evidence that an assessment had been levied for the purpose of paying interest on such bonds shows that money in the hands of the treasurer was subject to the payment of the interest coupons, and that parol evidence to the effect that the purpose of the assessment was different from that declared in the resolution adopted by the board when the assessment was levied, is not admissible. Hewel v. Hogin, 3 Cal. App. 248, 84 Pac. 1002 (1906).

b. To Compel Levy of Assessment.

Under the procedure in the federal courts, before mandamus to compel the levy of an assessment to pay bonds or interest can be maintained, the holder of the bonds is required to reduce his bonds or coupons to judgment and have execution returned. See Shepard v. Tulare Irr. Dist., 94 Fed. 1 (1899). affirmed in 185 U. S. 1, 46 L. Ed. 773, 22 Sup. Ct. 531 (1902); Herring v. Modesto Irr. Dist., 95 Fed. 705 (1899). See *ante* VI, K, 1, this note.

But in the state courts it has been held that mandamus will lie to enforce levy of an assessment for the payment of interest coupons without first reducing them to judgment. Shinbone v. Randolph County, 56 Ala. 183 (1876).

Mandamus lies against the officers of an irrigation district, organized under

corporation of the city had been acquiesced in by the people expressed in two elections covering a period of three years; and that new duties and obligations had been assumed by the corporation, and that during such time no citizen or taxpayer had ever in any way questioned the validity of such organization. That case, however, is very different from the one now under consideration. In that case the citizens of the city participated in the municipal affairs of the city under such organization; and by so participating therein clearly recognized the validity of such incorporation and at no time questioned the same. In the case under consideration, however, the railroad company did not participate in recognizing the validity of the change in the boundaries of such district by incorporating therein the town lots of the city of Nampa, for

the California Wright Act (Laws 1887, p. 29), at the suit of a bondholder who has recovered judgment on the bonds, to compel the officers of the district to levy an assessment against the property in the district to raise money from which to pay the judgment. Marre v. San Jacinto & P. V. Irr. Dist., 131 Fed. 780 (1904). See Heine v. Levee Commissioners, 86 U. S. (19 Wall.) 655, 22 L. Ed. 223 (1873); Holt County v. National Life Ins. Co., 80 Fed. 686 25 C. C. A. 469, 475 (1897).

This is on the general principle that where the law provides that a tax shall be levied to pay corporation bonds, mandamus after judgment, to compel the levying of the tax, is the appropriate remedy of the bond holder. See United States ex rel. Von Hoffman v. Quincy, 71 U. S. (4 Wall.) 535, 18 L. Ed. 403 (1866); United States ex rel. Riggs v. Johnson County, 73 U. S. (6 Wall.) 166, 18 L. Ed. 768 (1867); Heine v. Board of Levee Commissioners, 86 U. S. (19 Wall.) 655, 22 L. Ed. 223 (1873).

L. Form of.

Under the requirement of section 15 of the California Wright Act, bonds drawn so as to be payable in installments are in proper form. Central Irr. Dist. v. De Lappe, 79 Cal. 351, 21 Pac. 825 (1889).

The bonds issued by an irrigation district shall be in form such that they are payable in installments, of such percentage each year as is designated in the statute. In re Madera Irr. Dist., 92 Cal. 296, 28 Pac. 272, 675, 27 Am. State Rep. 106, 14 L. R. A. 755 (1891).

Bonds do not fail to comply with the statutory requirement that they shall be "negotiable in form," by making the payment of principal payable only upon surrender of the coupons; the insertion in the instrument of a stipulation for this condition, which would in any event be implied, does not affect its negotiability. Stowell v. Rialto Irr. Dist., 155 Cal. 215, 100 Pac. 248 (1909). See Humboldt Township v. Ling, 92 U. S. 643, 23 L. Ed. 752 (1875); Franks v. Wessels, 64 N. Y. 155 (1876).

Under the Washington Statute (Laws 1889-90, p. 671; Laws 1895, p. 432), which requires irrigation district bonds to be negotiable in form, bonds reciting that they and the interest thereon are to be paid by revenue derived from an annual tax upon the real property of the district, are negotiable, though reciting that they are payable from a particular fund. Kincade v. Witherop, 29 Wash. 10, 69 Pac. 399 (1902). See Mercer County v. Hackett, 68 U. S. (1 Wall.) 83, 17 L. Ed. 548 (1863).

M. Interest on.

The interest on the bonds of an irrigation district must be such as is provided by the act under which the district is

the reason that no assessment was made against such company during the years after the boundary lines were so changed as to include therein such lots until the assessment made in 1905 which is under consideration in this case. The railroad company was not called upon to challenge the validity of the boundary of such district by including such lots until the district had taken some action against such lots which in some way affected the railway company; and this did not occur until the year 1905. The railway company was not in a position to question the validity of the change in the boundaries of such district until such time.

For these reasons, we hold that the lower court committed no error in holding that the town lots described in the complaint, as being situated within the town of Nampa, were not at such time, and have never been, included within the boundary lines of such irrigation district.

organized, or, in the absence of any provision by that act, such as is provided by the general statutes of the state. No interest, however, is collectible against an irrigation district or the treasurer thereof (see *ante* V, D, this note) where no provisions for such interest are made. Hewel v. Hogin, 3 Cal. App. 248, 84 Pac. 1002 (1906).

Irrigation bonds issued under Washington Irrigation District Law (Laws 1889-90, p. 671; Laws 1895, p. 432), sold to purchasers under condition that they were to draw interest from payment of the purchase money, being dated July 1, and drawing interest therefrom, though it was not until after July that the purchaser paid according to his contract, when he paid three hundred dollars more than he was obliged to under his agreement to purchase to make up for the accumulated interest, were held in substantial compliance with the provisions of the statute. Kincade v. Witherop, 29 Wash. 10, 69 Pac. 399 (1902).

N. Issuance of.

The bonds of an irrigation district must be issued in conformity with the act by which they are authorized (Wright v. East Riverside Irr. Dist., 138 Fed. 313—1905), and for the purposes only for which authorized. Marre v. San Jacinto & P. V. R. Irr. Dist., 131 Fed. 780 (1904); Leeman v. Perris Irr. Dist., 140 Cal. 540, 74 Pac. 24 (1903); Merchants' Nat. Bank v. Escondido Irr. Dist., 144 Cal. 329, 77 Pac. 937 (1904); Boskowitz v. Thompson, 144 Cal. 724, 78 Pac. 290 (1904); Pioneer Irr. Dist. v. Campbell, 10 Idaho 159, 77 Pac. 328 (1904).

The power of the irrigation district, as a public corporation to issue bonds, must be exercised strictly in pursuance of the manner prescribed by statute. There is no doubt regarding it being within the power of the state to prescribe the manner of issuing and the form in which such bonds shall be issued and executed in order to bind the public for their payment; and if not so issued and executed they create no legal liability. Anthony v. County of Jasper, 101 U. S. 693, 25 L. Ed. 1005 (1879), distinguishing Town of Weyauwega v. Ayling, 99 U. S. 112, 25 L. Ed. 470 (1878); Stowell v. Rialto Irr. Dist., 155 Cal. 215, 222, 100 Pac. 248 (1909). See 148 U. S. 395, 37 L. Ed. 495, 13 Sup. Ct. 638 (1893).

Authority to issue bonds is wholly independent of the source of supplying of water for the district and the board of directors may change plans for obtaining its water and obtain it from another source when they find it to the advantage of the district to do so, without in any way impairing the validity of the bonds theretofore voted and ordered issued. Modesto

The judgment of the district court is affirmed as to the town lots in the town of Nampa not having been included within said district and made subject to assessments, and is reversed as to all other parts of said judgment; and a new trial is ordered. Costs awarded to appellant.

AILSHIE, J., concurs.

SULLIVAN, C. J. (dissenting). I am unable to concur in the conclusion reached by my associates except in so far as it affirms the judgment of the district court as to the town lots in the town in Nampa. I do not think it was ever contemplated by said district irrigation act that a railroad right of way could ever be benefited by irrigation or that such

Irr. Co. v. Tregea, 88 Cal. 334, 26 Pac. 237 (1891).

The matter of the issuance of bonds may be considered and determined at a regularly adjourned meeting, the same as if it had been presented and determined on the day fixed for the regular meeting. Directors of Fallbrook Irr. Dist. v. Abila, 106 Cal. 365, 39 Pac. 793 (1895).

A resolution of a board of directors for the issuance of bonds for a specified amount may be rescinded by such board. Directors of Fallbrook Irr. Dist. v. Abila, 106 Cal. 365, 39 Pac. 793 (1895).

A contract by the board of directors of an irrigation district whereby it issues all its bonds in consideration of water certificates from a water company which has no water plant within the district, on an executory promise in the future to lease water to the amount specified in the certificates to the district at a fixed rental, is void. Leeman v. Perris Irr. Dist., 140 Cal. 540, 74 Pac. 24 (1903).

Irrigation bonds issued to a contractor at ninety per cent. of their face value in payment for construction work done by him, are illegally issued and do not constitute a valid obligation against the district in his hands, and an injunction will lie to enjoin the collection of an assessment for interest upon such bonds. Hughson v. Crane, 115 Cal. 404, 47 Pac. 120 (1896).

As to recovery of the consideration for such bonds, see *ante* VI, C, 2; *post* VIII, C, 1, this note.

The directors of an irrigation district have no authority to appropriate the bonds which the electors have voted to issue for the construction of an irrigation works to the payment of salaries or expenditures incurred in the management of the property. Hughson v. Crane, 115 Cal. 404, 47 Pac. 120 (1896).

O. Lien on Lands.

Under the various irrigation district acts, the bonds issued by the district and the interest payable thereon are made a lien upon the lands in the irrigation district. Such lien is purely statutory and must be strictly pursued. Boskowitz v. Thompson, 144 Cal. 724, 78 Pac. 290 (1904).

It has been said that under the California Statute (Stats. 1887, p. 27, and Laws 1891, p. 149, § 122) creating irrigation districts and authorizing a board of directors to levy an assessment to pay interest on bonds, in an action to confirm the levy of an assessment the court cannot declare that the bonds were a lien on the land or interfere with the discretion of the board in determining the amount of assessment to be raised except in case of abuse of discretion. Boskowitz v. Thompson, 144 Cal. 724, 78 Pac. 290 (1904).

right of way would ever become susceptible of irrigation, from a system of works that might be used by an irrigation district for irrigating the lands in the district. The first section of said act (Laws 1899, p. 408) refers to lands susceptible of "one mode" of irrigation, and was never intended to include lands, in assessing benefits, that were never intended to be irrigated.

The record, to my mind, clearly shows that those who organized this district and the governing authorities of the district for at least three years after it was organized, did not consider the railroad right of way as land coming within the terms of said district irrigation act as being lands susceptible of irrigation. As no benefits were ever assessed against said right of way, the railroad company has not had its day in court

A landowner who has, in accordance with the provisions of the law under which the district is organized, waived his right to the use of water from the district, is not liable on the bonds issued by the district, and assessments to pay interest or principal of such bonds will not be a lien upon his lands. Nampa & M. Irr. Dist. v. Brose, 11 Idaho 474, 83 Pac. 499 (1905).

P. Supplying Water for Use Outside of District.

Where an irrigation district organized in accordance with the provisions of the Idaho Statute (Laws 1899, p. 408, as amended by Laws 1901, p. 191) has issued bonds for the construction or purchase of the canal system and works, the fact that said system, when completed, will supply and water lands outside of the district, does not render the bonds issued by the district invalid. Settlers' Irr. Dist., v. Settlers' Canal Co., 14 Idaho 504 94 Pac. 829 (1908). As to supplying water to land outside of the district, see *post* VIII, B, 2, this note.

Q. Term of.

Where the statute designates the term for which the bonds of an irrigation district shall run, those bonds in which payment is provided for either at the expiration of an earlier period, as where the statute authorizes bonds payable in not less than ten years from date, and bonds were payable eleven days less than ten years (Wright v. East Riverside Irr. Dist., 138 Fed. 313—1905; Peoples Bank v. School Dist., 3 N. Dak. 496, 57 N. W. 787—1893). See Brownell v. Town of Greenwich, 114 N. Y. 518, 22 N. E. 24—1889; Hoag v. Town of Greenwich, 133 N. Y. 152, 30 N. E. 842—1892; Proctor v. Town of Greenwich, 92 N. Y. 662—1883); or a longer term (Brenham v. German American Bk., 144 U. S. 173, 188, 36 L. Ed. 390, 12 Sup. Ct. 975—1892; Barnum v. Okoloma, 148 U. S. 393, 37 L. Ed. 495, 13 Sup. Ct. 638—1893, approving and following Woodrie v. Okoloma, 57 Miss. 806—1880) than that authorized by statute, will be invalid. See Stowell v. Rialto Irr. Dist., 155 Cal. 215, 100 Pac. 248 (1909).

Where the bonds of an irrigation district are antedated so as to make them fall due within a shorter time than that prescribed by the statute, they are void (Gilbert, J., dissenting). Wright v. East Riverside Irr. Dist., 138 Fed. 313 (1905). See *ante* VI, F, this note.

VII. Assessments.

A. As to, Generally.

Whenever a local improvement is authorized, it is for the legislature to prescribe a way in which the means to meet its cost shall be raised, whether by general taxation or by levying the burden upon the district especially benefited by the expenditure. Mobile County v. Kimball, 102 U. S. 691, 704, 22 L. Ed. 238

and had no opportunity to contest an assessment of benefits, for the reason that the board of directors never assessed any benefits to said railroad right of way; but assessed each 40-acre tract, across which said right of way extends, to the party holding the legal title thereto at six dollars per acre. As said railroad company has not the legal title to said tracts and owns only an easement therein, and that easement not having been assessed, the company has not had its day in court in so far as an assessment of benefits is concerned. The judgment of the district court should be affirmed.

On Rehearing.

AILSHIE, J. A petition for rehearing has been filed in which complaint is made that the court did not cite or review the authorities cited

(1880); Hagar v. Reclamation Dist., 111 U. S. 701, 28 L. Ed. 569, 4 Sup. Ct. 663 (1883); Turlock Irr. Dist. v. Williams, 76 Cal. 360, 18 Pac. 379 (1888).

See *ante* I, C, 1, this note.

Those clauses of the Constitution which provide that taxation shall be equal and uniform, and which prescribe the mode of assessment, and the persons by whom it shall be made, and that all property shall be taxed, have no application to assessments levied for local improvements. Hagar v. Supervisors of Yolo County, 47 Cal. 222 (1874); Turlock Irr. Dist. v. Williams, 76 Cal. 360, 18 Pac. 379 (1888).

B. As to Levy by Board of Directors.

1. Generally.

The board of directors of an irrigation district have power to levy an assessment upon the lands and other property provided within an irrigation district for the purpose of raising money for current expenses to pay the cost of construction or acquisition of a water system and to pay the annual interest on bonds and to meet the bonds at maturity. Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. 56 (1896); Tregea v. Owens, 94 Cal. 317, 29 Pac. 643 (1892); Quint v. Hoffman, 103 Cal. 506, 37 Pac. 514 (1894); Woodruff v. Perry, 103 Cal. 611, 37 Pac. 526 (1894); City of San Diego v. Linda Vista Irr. Dist., 108 Cal. 189, 41 Pac. 291, 35 L. R. A. 33 (1895); Cooper v. Miller, 113 Cal. 238, 45 Pac. 325 (1896); Lahman v. Hatch, 124 Cal. 1, 56 Pac. 621 (1899); Merchants' Nat. Bank v. Escondido Irr. Dist., 144 Cal. 329, 77 Pac. 937 (1904); Portneuf Irr. Co. Limited v. Budge, 16 Idaho 116, 100 Pac. 1046 (1909); Knowles v. New Sweden Irr. Dist., 16 Idaho 217, 101 Pac. 81 (1908).

But under the Idaho Laws before an irrigation district can levy an assessment for any purpose, it must be in a position to render some benefit. Knowles v. New Sweden Irr. Dist., 16 Idaho 217, 101 Pac. 81 (1908).

2. California Act.

Under the California Wright Act, an assessment levied upon the property within an irrigation district organized under that act is distinct from a tax and is not subject to the constitutional provisions respecting taxation. In re Madera Irr. Dist., 92 Cal. 296, 28 Pac. 272, 675, 27 Am. St. Rep. 106, 14 L. R. A. 755 (1891); Tregea v. Owens, 94 Cal. 317, 29 Pac. 643 (1892).

Under this act it is not necessary to the validity of an assessment that the methods adopted for the levy thereof and for the collection should be assimilated to, and follow exactly the mode provided in the state constitution for the assessment and collection of taxes

in appellant's brief. The court has not the time, nor does it often deem it necessary to review at length in written opinions the authorities cited by counsel. Authorities are only useful in so far as they elucidate the reasons for a given rule and make plain the justice such rule accomplishes. Without stating the several propositions advanced by appellant's petition, we will refer briefly to the more prominent ones.

First. It must be admitted as fully settled that a railroad right of way acquired under act of Congress of March 3, 1875, c. 152, 18 Stat. 482 (U. S. Comp. St. 1901, p. 1568), cannot be used or alienated for any other purposes than those named in the grant, and upon a cessation of such use the right granted reverts to the owner of the fee. N. P. Ry. Co. v. Townsend, 190 U. S. 267, 23 Sup. Ct. 671, 47 L. Ed. 1044. If,

for general state purposes. Turlock Irr. Dist. v. Williams, 76 Cal. 360, 18 Pac. 379 (1888).

There is a due process of law and equal protection to all when the course pursued for the assessment and collection of taxes is that customarily followed in the state and when the party charged in his property has an opportunity to be heard. Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. 56 (1896).

The board of directors of an irrigation district in levying an assessment to pay interest on bonds under the provision of the Wright Act and amendments thereto (Stats. 1887, p. 27; 1891, p. 149, § 122) have a discretion as to the amount of the levy, which the courts cannot interfere with, except in case of abuse of discretion. Boskowitz v. Thompson, 144 Cal. 724, 78 Pac. 290 (1904). See *post* VII, D, this note.

3. Idaho Act.

Under the Idaho Irrigation District Laws (Sess. Laws 1899, p. 408), and the acts amendatory thereof, an irrigation district has power and authority to levy and collect assessments against the land within the district according to benefits received (Portneuf Irr. Co. Limited v. Budge, 16 Idaho 116, 100 Pac. 1046—1909); but only when in a position to render some benefit. Knowles v. New Sweden Irr. Dist., 16 Idaho 217, 101 Pac. 81 (1908).

Under this act where the record shows that the board of directors, in levying an assessment for maintenance and to pay the bonded indebtedness of an irrigation district, substantially complied with the statute, and the assessment roll is made up in substantial compliance with the statute, the assessment thus levied will be upheld if the description of the property is sufficient to give the landowner notice that such property is burdened with such assessment. Oregon Short Line R. Co. v. Pioneer Irr. Dist., 16 Idaho 578, 102 Pac. 904 (1909).

C. As to Neglect or Refusal to Levy.

1. Duty of County Board.

Under the various irrigation district laws, it is made the duty of the board of directors of an irrigation district to levy assessments to raise money wherewith to meet the current expenses of operating the district, to pay the interest on the bonds, and for retiring the bonds of the district at maturity; and where such directors neglect or refuse to make such levy or levies, it is made the duty of the county board of supervisors or county commissioners of the county in which the district has its office to cause an assessment roll for the district to be prepared, and to make the levy of an assessment to meet the requirements of the district. Board of Supervisors of

therefore, a sale should be made of the railroad company's right of way, the purchaser would acquire only such rights and interest as the company possessed, and would be limited to the same conditions and restrictions as to use as were imposed by the original grant. A purchaser at judicial sale under decree of court can acquire only such title and right as the defendant in the action has. Nelson Bennett Co. v. Twin Falls Land & Water Co., 14 Idaho 5, 93 Pac. 789.

Second. Assessments by irrigation districts are made on the land itself—the soil—irrespective of the use. The decisive question is not the use to which an owner is going to devote his land, but, is it susceptible of irrigation from the proposed system of irrigation? For such purposes an assessment against the land itself as belonging to the

Riverside County v. Thompson, 122 Fed 860 (1903); Nevada Nat. Bank v. Kern County Supervisors, 5 Cal. App. 638, 91 Pac. 192 (1907); State ex rel. Witherop v. Brown, 19 Wash. 383, 53 Pac. 548 (1898).

In those cases where the county board is required to make a levy on failure or refusal of the board of directors of irrigation district to make the same, such county board may properly include the expenses of the levy of the assessment therein. Nevada Nat. Bank v. Kern County Supervisors, 5 Cal. App. 638, 91 Pac. 192 (1907).

2. Mandamus.

Mandamus lies to compel the county board of supervisors or county commissioners to levy an assessment to pay the annual interest on bonds of an irrigation district where the board of directors of such district neglect or refuse to levy such an assessment. Board of Supervisors of Riverside County v. Thompson, 122 Fed. 860 (1903); Nevada Nat. Bank v. Kern County Supervisors, 5 Cal. App. 638, 91 Pac. 122 (1907); State ex rel. Witherop v. Brown, 19 Wash. 383, 53 Pac. 548 (1898). And no previous demand on the county board is necessary before commencing such proceedings. Board of Supervisors of Riverside County v. Thompson, 122 Fed. 860 (1903). The writ is properly awarded to compel the supervisors to make the assessment, although the petitioner's demand is represented by a judgment against the irrigation district on its bonds. Nevada Nat. Bank v. Kern County Supervisors, 5 Cal. App. 638, 91 Pac. 192 (1907).

D. Annual to Pay Interest, Discretion.

The board of directors are empowered by section 22 of the Wright Act to levy an assessment sufficient to raise the annual interest on the outstanding bonds, and while the authority given is limited to provide for the interest for the bonds that are outstanding at the time of the levy, it does not require that the amount of the assessment shall be the exact amount of the interest; a discretion in determining how great an assessment will be sufficient to raise the annual interest is lodged in the board of directors, and, unless it can be seen that they have abused this discretion, courts will not interfere with their action in the premises. Hughson v. Crane, 115 Cal. 404, 47 Pac. 120 (1896); Escondido High School Dist. v. Escondido Seminary, 130 Cal. 128, 133, 62 Pac. 401 (1900); Boskowitz v. Thompson, 144 Cal. 724, 78 Pac. 290 (1904); Lincoln & Dawson County Irr. Dist. v. McNeal, 60 Neb. 621, 83 N. W. 847 (1900).

See *post* VII, J, this note.

But an injunction will lie to prevent the enforcement of an excessive assessment where the disparity between the

owner of the fee or paramount title covers all special and limited rights, interest, and easements in the land. While it is generally held that land dedicated to a public use cannot while so held and used be assessed for a similar public use or necessity, this does not apply where the ownership of the easement, right, or franchise is private, and the use only to which it is applied is quasi public. In such case the use can be as readily carried out and enjoyed by the public with the ownership in one corporation, organized and created for such ownership and management, as in the hands of another. Where the ownership is in the public, a very different question arises.

Third. As to whether a sale of appellant's right of way takes only appellant's easement and right or the entire fee and reversionary right

amount of the assessment and the annual interest is such as to make it appear that the action of the board was improper. Hughson v. Crane, 115 Cal. 404, 47 Pac. 120 (1896).

In an action to enjoin the collector of an irrigation district from the collection of an assessment levied to pay the interest on bonds illegally issued, neither the irrigation district nor its agent for the sale of the bonds, nor the holder of any of the bonds thus disposed of, are necessary parties. Hughson v. Crane, 115 Cal. 404, 47 Pac. 120 (1896).

E. Basis of Assessment.

An assessment levied under the California Irrigation Act is levied according to the value of the land, and not according to the amount of benefits received by the respective parcels, to pay for a public improvement in an irrigation district, is within the inherent power of taxation, which is not limited to benefits received. Lent v. Tillson, 72 Cal. 404, 429, 14 Pac. 71 (1887); In re Madera Irr. Dist., 92 Cal. 296, 307, 28 Pac. 272, 675, 27 Am. St. Rep. 106, 14 L. R. A. 755 (1891).

While the benefit to the land is assumed as the basis of the assessment, such benefit is not the true source of the power of the levy; even though the land is not susceptible of irrigation it may be benefited by the improvement, and should bear its proportion of the burden upon the same principle that land in a city which can make no use of a sewer or other street improvement is nevertheless deemed to receive a benefit from its construction and is required to pay a portion of its cost. In re Madera Irr. Dist., 92 Cal. 296, 28 Pac. 272, 675, 27 Am. St. Rep. 106, 14 L. R. A. 755 (1891).

The California doctrine on the above point seems to be opposed to the current of American cases, according to which local assessments for public improvements can be levied only when the improvements will clearly confer benefits on the property assessed, and then only to the extent of the benefits received. See the following cases:

Colorado.—Chew v. Comm'rs Fremont County, 18 Colo. App. 162, 70 Pac. 764 (1902).

Connecticut.—Nichols v. Bridgeport, 23 Conn. 189, 204, 60 Am. Dec. 636 (1854); Cone v. Hartford, 28 Conn. 363 (1859); Clapp v. Hartford, 35 Conn. 66 (1868).

Illinois.—Chicago v. Larned, 34 Ill. 203, 279 (1864); Lee v. Ruggles, 62 Ill. 427 (1872); Illinois Cent. R. Co. v. Bloomington, 76 Ill. 447 (1875); Crawford v. People ex rel. Ramsey, 82 Ill. 557 (1876).

Idaho.—See authorities cited *infra.*

Indiana.—Montgomery v. Fuller (Ind.), 13 N. E. 574 (1887); Anderson

is unimportant here. It is enough for appellant if a sale would take all its right and vest the same in the purchaser. Of that we think there can be no doubt. That the assessment must be on the basis of benefits to be received is equally true. But that question cannot arise in this case. The company has had its day in court, both before the commissioners and in the district court on confirmation proceedings, and the judgment therein is now final, and the company can no longer be heard to question the benefits to be received. As a matter of fact, it is common knowledge that in this state railroad companies do irrigate a part, at least, of their station grounds at all such stations as they can conveniently get water, and it was admitted on oral argument of this case that appellant does irrigate a part of the station grounds covered by this

v. Kerns Draining Co., 14 Ind. 199, 77 Am. Dec. 63 (1860); O'Reiley v. Kankakee Valley Draining Co., 32 Ind. 169 (1869).

Kansas.—Gilmore v. Hentig, 33 Kan. 156, 174, 5 Pac. 781 (1885); Wyandotte County Comm'rs v. Abbott, 52 Kan. 148, 34 Pac. 416 (1893).

Louisiana.—In re New Orleans Draining Co., 11 La. Ann. 338 (1856); Excelsior Planting & Mfg. Co. v. Green, 39 La. Ann. 455, 1 So. 873 (1887).

Massachusetts.—Goddard Petitioner, 33 Mass. (16 Pick.) 504 (1835); Lowell v. Hadley, 49 Mass. (8 Met.) 180 (1844); Wright v. Boston, 63 Mass. (9 Cush.) 233 (1852); Brewer v. Springfield, 97 Mass. 152 (1867); Green v. Fall River, 113 Mass. 262 (1873).

Michigan.—Thomas v. Gain, 35 Mich. 155, 24 Am. Rep. 535 (1876).

Minnesota.—Sanborn v. Rice County, 9 Minn. 273 (1864).

New Jersey.—Tidewater Co. v. Coster, 18 N. J. Eq. (3 C. E. Gr.) 518, 90 Am. Dec. 634 (1866); State v. Newark, 27 N. J. L. (3 Dutch) 185 (1858); State v. Fuller, 34 N. J. L. (5 Vr.) 227 (1870); In re Drainage of Lands, 35 N. J. L. (6 Vr.) 497 (1872); State v. Jersey City, 36 N. J. L. (7 Vr.) 56 (1872); State v. Hoboken, 36 N. J. L. (7 Vr.) 291 (1873); Kean v. Driggs Draining Co., 45 N. J. L. (16 Vr.) 91 (1883); Spear v. Essex Public Road Board, 47 N. J. L. (18 Vr.) 191 (1885); 48 N. J. L. (19 Vr.) 372, 9 Atl. 197 (1886); Aldridge v. Essex Public Road Board, 48 N. J. L. (18 Vr.) 366, 5 Atl. 784 (1886); 51 N. J. L. (22 Vr.) 166, 16 Atl. 695 (1888).

New York.—People v. Syracuse, 63 N. Y. 291, 299 (1875); Stryker v. Kelly, 7 Hill 9, 23, 2 Den. 323 (1844); In re Fourth Ave., 3 Wend. 452 (1830); In re Albany Street, 11 Wend. 149, 25 Am. Dec. 618 (1834); In re Canal Street, 11 Wend. 154 (1834); In re William Street 19 Wend. 678 (1839).

Ohio.—Hill v. Higdon, 5 Ohio St. 243, 67 Am. Dec. 289 (1855); Reeves v. Wood County, 8 Ohio St. 333 (1858); Sessions v. Crunkilton, 20 Ohio St. 349 (1870); Chamberlain v. Clevland, 34 Ohio St. 551, 561 (1878).

Pennsylvania. — Commonwealth v. Woods, 44 Pa. St. 113 (1862); Hammett v. Philadelphia, 65 Pa. St. 146, 3 Am. Rep. 615 (1870—Read and Williams, JJ., dissent); In re Washington Ave., 69 Pa. St. 352, 8 Am. Rep. 255 (1871); Seeley v. Pittsburgh, 82 Pa. St. 360, 22 Am. Rep. 760 (1877); Allegheny City v. Western Pa. R. Co., 138 Pa. St. 375, 21 Atl. 763 (1891).

Tennessee.—McBean v. Chandler, 56 Tenn. (9 Heisk.) 349, 24 Am. Rep. 308 (1872).

Wisconsin.—Weeks v. Milwaukee, 10 Wis. 186 (1860).

controversy. Whether it be from this system or not is immaterial for the purposes of this inquiry. The question of notice was fully covered in the original opinion.

Fourth. It is contended that a sale of a portion of appellant's right of way cannot be made. Elliott on Railroads, vol. 2, § 790, treating of the subject of assessments on a railroad right of way, says: "While it is probably true that there may be a lien on the right of way of a railroad for a local assessment, where such assessment is authorized by statute, the manner of enforcing such assessment is not clearly settled. The right of way of a railway company is a part of the company's property, without which it could not perform the duties it owes to the public. To subject a portion of the right of way to a sale to enforce a local improve-

Under the Idaho Irrigation Law, and probably under some others, the assessments are required to be levied according to the benefits received. Settlers' Irr. Dist. v. Settlers' Canal Co., 14 Idaho 504, 94 Pac. 829 (1908); Gerber v. Nampa & Meridian Irr. Dist., 16 Idaho 1, 100 Pac. 80 (1908); Portneuf Irr. Co. Limited v. Budge, 16 Idaho 116, 100 Pac. 1046 (1909); Knowles v. New Sweden Irr. Dist., 16 Idaho 217, 101 Pac. 81 (1908); Oregon Short Line R. Co. v. Pioneer Irr. Dist., 16 Idaho 578, 102 Pac. 904 (1909).

F. Confirmation.

Proceedings for the confirmation of an assessment levied for any purpose by an irrigation district are fully provided for in the respective laws governing their organization and management, and have already been sufficiently discussed in parts III and VI, D, this note.

Courts may inquire into and determine the validity of the assessment of an irrigation district or other proceedings, but unless the statute has declared the assessment to be a lien, the court cannot adjudge it one, and if the statute has declared it to be a lien and provided for its enforcement, its enforcement can be made in the manner prescribed by statute only. Boskowitz v. Thompson, 144 Cal. 724, 78 Pac. 290 (1904).

Under the Idaho Irrigation District Laws, personal service upon the landowners is not necessary in order to render judgment confirming an assessment binding upon him and his property; but if he is dissatisfied with the judgment confirming the assessment, he has a right to appeal therefrom. Knowles v. New Sweden Irr. Dist., 16 Idaho 217, 101 Pac. 81 (1908).

G. Current Expenses, to Meet.

Under the California Wright Act (§ 17) the board of directors of an irrigation district is authorized and empowered to levy special assessments to cover the expenses of organization and care, operation, management, repair, and improvement of canals and works, including salaries, wages, and expenses of management, as well as for the sale of bonds by means of which to make the payments required upon the contracts for the construction of the works. Tregea v. Owens, 94 Cal. 317, 29 Pac. 643 (1892); Hughson v. Crane, 115 Cal. 404, 47 Pac. 120 (1896). But it has been held that a "bond expense fund" cannot be included in such assessment in the absence of a special election authorizing an assessment for such fund; and where the board of directors include in an assessment a "bond expense fund" without such authorization, the court in determining that the invalidity of that portion of the assessment should also determine whether the disparity between the amount levied and the amount which the

ment would greatly embarrass, if not entirely destroy, the ability of the company to perform its public functions. The rights of the public are regarded as superior to the rights of any individual, or group of individuals. Local assessments are usually levied on a small portion of a railway right of way, varying from a few feet in length to miles in length. To permit such portion to be sold would prevent the operation of the road, and, on the grounds of public policy, it is held that the ordinary remedy of enforcing the collection of a local assessment by a sale of the property benefited does not apply to the enforcement of an assessment against the right of way of a railway company. While there is a conflict of authority on this subject, the decided weight is that the right of way, if sold to pay the assessment, must be sold as a whole, and

board, in its discretion, was authorized to raise for the payment of annual interest, was such as to vitiate the entire assessment. Boskowitz v. Thompson, 144 Cal. 724, 78 Pac. 290 (1904).

H. Description of Land.

Under the California Irrigation District Laws (Sess. Laws 1891, p. 244, § 18, subd. 2) provision is made that, in the assessment books, land within the district shall be listed by township, range, section or fractional section, and where there are no congressional districts, by metes and bounds or other description sufficient to identify it. An assessment thus entered in the books becomes a lien upon the land described in such books. Best v. Wohlford, 153 Cal. 17, 94 Pac. 98 (1908). But under this statute the assessment of improvements in an irrigation district in a tax levied for district purposes, need not be described in the assessment book; all that is necessary is a general description of improvements, with the value at which they are assessed. Lahman v. Hatch, 124 Cal. 1, 56 Pac. 621 (1899). See People v. Rains, 23 Cal. 127 (1863).

The substantial rights of persons assessed are not affected by the act of the assessor taking away the assessment book while in the custody of the board of equalization from five o'clock Saturday afternoon until Monday morning, for the purpose of adding therein unnecessary description of improvements. Lahman v. Hatch, 124 Cal. 1, 56 Pac. 621 (1899). The misdescription of lands in such book, by misnomer in the ownership, does not invalidate the levy where the assessment is otherwise properly levied. Escondido High School Dist. v. Escondido Seminary, 130 Cal. 128, 62 Pac. 401 (1900).

I. Election.

Under the provisions of section 37 of the Wright Act, the board of directors of an irrigation district have no authority to levy assessments for the payment of expenditures authorized thereby without a previous approval by the voters of the district at an election held for that purpose, in accordance with the provisions of section 41 of that Act, which provides for the calling of an election for the purpose of submitting the question of a special assessment when, in the judgment of the board of directors, it may be advisable, and restricts the assessment to an authorization to a vote by the district. Tregea v. Owens, 94 Cal. 317, 29 Pac. 643 (1892); Hughson v. Crane, 115 Cal. 404, 47 Pac. 120 (1896). And where an assessment is not authorized by a vote of the district the collection may be restrained by an injunction. Woodruff v. Perry, 103 Cal. 611, 37 Pac. 526 (1894).

J. Excessive Levy.

Although the board of directors of an

not in broken fragments." It will be seen from an examination of the cases cited in the note to this text, as well as the text and notes in 28 Cyc. 1211, that the great majority of the courts have held that a railroad right of way cannot be sold in parcels or fragments for the satisfaction of local assessments. There are courts, however, which hold to the contrary. This is particularly true in the state of Illinois. Wabash Eastern Ry. Co. v. East Lake F. Dist., 134 Ill. 384, 25 N. E. 781, 10 L. R. A. 285; Chicago & N. W. Ry. Co. v. Village of Elmhurst, 165 Ill. 148, 46 N. E. 437.

It seems to be conceded by all the authorities that the legislature has the power to authorize the sale for local assessments of a portion only of a railroad right of way, or, rather, of the portion or division situated

irrigation district has a discretion as to the amount to be levied with which to meet and pay the annual instalment of interest upon the bonds already issued by the district (see *ante* VII, B, 1, and D, this note), yet where a levy by the directors of an irrigation district is in excess of what they are entitled to impose, a party will not be heard in a court of equity seeking to enjoin the collection until he has paid the amount the board had the power to levy upon the land. Quint v. Hoffman, 103 Cal. 506, 37 Pac. 514 (1894).

The collection of a slight excess over and above the amount required to be made by an assessment to pay the annual interest, does not show such an abuse of discretion by the board of directors in levying the assessment as will render a tax deed based upon the assessment, invalid. Escondido High School Dist. v. Escondido Seminary, 130 Cal. 128, 62 Pac. 401 (1900).

In an action to enjoin the collector of an irrigation district from selling lands to pay an assessment for interest upon bonds, the collector represents the district for the purposes of the defense only, and not for purposes of seeking affirmative relief. Boskowitz v. Thompson, 144 Cal. 724, 78 Pac. 290 (1904).

Bondholders intervening in a suit by landowners to restrain the collection of taxes to pay interest on bonds, are not entitled to affirmative relief, and for that reason cannot maintain a cross-complaint to enforce a lien upon the land in their favor as bona fide purchasers for value. Boskowitz v. Thompson, 144 Cal. 724, 78 Pac. 290 (1904).

Approved *arguendo* Alpers v. Bliss, 145 Cal. 565, 79 Pac. 171 (1904).

A right of action on the part of the landowners to enjoin the board of directors of an irrigation district organized under California Act, March 7, 1887, from making future assessments, accrues with a threatened levy of assessments and not with the issuance and sale of the bonds for the payment of the annual interest or the principal with which the assessment is threatened. Miller v. Perris Irr. Dist., 85 Fed. 693 (1898).

K. Illegal Levy.

An illegal levy of an assessment by an irrigation district may be ratified by payment. See Calahan v. Chilcott Ditch Co., 37 Colo. 331, 86 Pac. 123 (1906).

In an action to recover assessments alleged to be illegally paid under duress, the plaintiff is entitled to plead and prove that the assessment was levied without calling a special election or submitting the question to the qualified electors of the district. Tregea v. Owens, 94 Cal. 317, 29 Pac. 643 (1892).

One who pays, under protest, unlawful assessments made against another, and out of the moneys of such other party

within the taxing district. It is also true that practically all the authorities holding that the right of way, if sold at all, must be sold in its entirety, rest, not upon any constitutional or organic right, but upon what is termed "public policy." It is said by these authorities to be contrary to the public interest and convenience and detrimental to bondholders and the railroad company to have a railroad right of way sold in sections or subdivisions. The reason for this rule fails to appeal to us. The danger of a railroad system being divided into numerous sections and sold to divers purchasers is too remote and improbable to furnish a basis or premise on which to deny justice to taxing districts and a ready means of collecting assessments lawfully levied. We may say here that we know of no principle

held for the purpose of such payment, cannot thereafter recover the same in an action instituted for that purpose. He will be deemed to have no interest therein or cause of action therefor. Portneuf Irr. Co. Limited v. Budge, 16 Idaho 116, 100 Pac. 1046 (1909).

In an action by an owner of land in an irrigation district to void and cancel an assessment levied upon the district, the burden of proof is upon the plaintiff. Baxter v. Vineland Irr. Dist., 136 Cal. 185, *sub nom.* Baxter v. Dickinson, 68 Pac. 601 (1902).

L. Lien on Land.

Under the various statutes providing for the organization and management of irrigation districts, assessments duly levied and properly ratified by vote constitute a lien upon the lands in the district. Merchants' Nat. Bank v. Escondido Irr. Dist., 144 Cal. 329, 77 Pac. 937 (1904). Thus section 18, subd. 2 of the California Laws of 1891, p. 244, provides that in the assessment books, land within the district shall be listed by township, range, section or fractional section, and where there are no congressional districts, by metes and bounds or other description sufficient to identify it, and the California Supreme Court has held that the assessment is a lien on the land described in the assessment book. Best v. Wohlford, 144 Cal. 733, 78 Pac. 293 (1904). In those states, however, where provision is made for exclusion of lands already adequately supplied with water, as in Idaho and Nebraska, and the owner of such lands has either waived his right to receive water from the district or has made a showing of sufficient water for land already, his lands are not subject to assessment either for the purpose of current expenses to pay interest on bonds or to pay the bonds of the district. Nampa & M. Irr. Dist. v. Brose, 11 Idaho 474, 83 Pac. 499 (1905).

M. Misnomer.

An assessment by an irrigation district properly imposed upon the land is not invalidated by a misnomer as to the owner, and a tax deed on sale thereunder is not vitiated thereby. Escondido High School Dist. v. Escondido Seminary, 130 Cal. 128, 62 Pac. 401 (1900).

N. Property Subject to.

1. Lands within District.

Under the provisions of the various statutes regulating the organization and control of irrigation districts, all the lands within the district are subject to assessment for the purpose of raising funds wherewith to pay the expense of the management of the district, the interest on the bonds, and to retire the bonds at maturity. Portneuf Irr. Co. Limited v. Budge, 16 Idaho 116, 100 Pac. 1046 (1909). This is true regardless

of public policy in this state that forbids the sale of a portion of a railroad right of way. In order for a principle or rule to have become a part of the public policy of a state, it must have been either expressly or impliedly recognized and acted upon by some one or all of the departments of state government or have found lodgment and recognition, either expressly or impliedly, in the Constitution, the organic law

of the question as to what particular use is being made of any particular tract or piece of land at the time the district is organized; for in determining whether land within a district will be benefited by an irrigation system, the county board is not limited to lands which will be used for agricultural purposes, or upon which water will be beneficially used, or to lands devoted to any particular purpose. Oregon Short Line R. Co. v. Pioneer Irr. Dist., 16 Idaho 578, 102 Pac. 904 (1909).

And lands which by reason of change of plans have become unnecessary for the purposes of the irrigation district, in the absence in the statute of any provisions for their disposition, remain impressed with the strict trust the same as other lands in the district, and equally subject to assessment. Tulare Irr. Dist. v. Collins, 154 Cal. 440, 442, 97 Pac. 1124 (1908). See San Francisco v. LeRoy, 138 U. S. 656, 34 L. Ed. 1097, 11 Sup. Ct. 364 (1890); Hart v. Burnett, 15 Cal. 530 (1860); Seale v. Doone, 17 Cal. 476, 484 (1861); Fulton v. Hanlow, 20 Cal. 450, 480 (1862); Carlton v. Townsend, 28 Cal. 219 (1865); San Francisco v. Cannavan, 42 Cal. 541 (1872); Ames v. City of San Diego, 101 Cal. 390, 35 Pac. 1005 (1894).

In California this principle has been applied to assessments for benefits upon lands owned by public corporations not necessary in the exercise of their functions. Tulare Irr. Dist. v. Collins, 154 Cal. 440, 443, 97 Pac. 1124 (1908). In Idaho, however, an irrigation district organized under the Idaho Act (Sess. Laws 1899, p. 408) acquires jurisdiction to levy special assessments against any particular tract of land within the district for the purpose of purchasing or constructing an irrigation system, it must appear that by reason of such construction or purchase, the district is going to be in a position to render benefits of some character, kind or nature, to the particular tract of land on which it seeks to levy its assessments. Jurisdiction in such cases to levy special assessments is dependent upon the power and ability to confer benefits to some extent and in some measure, and an absolute inability to confer any benefits, implies and signifies a lack of jurisdiction to levy such assessments. Portneuf Irr. Co. Limited v. Budge, 16 Idaho 116, 100 Pac. 1046 (1909).

2. Lands Detached from District.

The board of directors of an irrigation district has no power to levy an assessment upon lands not included within the boundary lines of the district in accordance with the laws governing the taking in of territory (Oregon Short Line R. Co. v. Pioneer Irr. Dist., 16 Idaho 578, 102 Pac. 904—1909); or being within the district is exempted by the statute for the reason that it is nonirrigable (Andrews v. Lillian Irr. Dist., 66 Neb. 461, 97 N. W. 336—1893; Sowerwine v. Central Irr. Dist., 85 Neb. 687, 124 N. W. 118—1909); or where the owner of the land already has sufficient water for the purpose of irrigating his land, and has waived his right to the use of water from the district, in accordance with the provisions of the statute providing for the exclusion from the district of such lands. Nampa & M. Irr. Dist. v. Brose, 11 Idaho 374, 83 Pac. 499 (1905); Knowles v. New Sweden Irr. Dist., 16 Idaho 217, 101 Pac. 81 (1908).

of the state. No such principle has been either expressly or impliedly recognized in this state. The contrary has been the uniform rule recognized by the legislative department of this state, and enforced by the executive and judicial departments in the revenue laws of the state. The irrigation district act (sections 2407-2415, Rev. Codes) directs and requires that the specific property on which the assessment is levied shall

3. Telegraph Poles and Wires.

Under the provisions of a statute taxing all the real estate within an irrigation district, such district can assess, for purposes of revenue, the real property only situated in the district; telegraph poles and wires of telegraph company passing through the district, although situated upon the right of way of a railroad company, with its permission, possess the character of personal property, and as such, cannot be taxed by the irrigation district. Western Union Tel. Co. v. Modesto Irr. Co., 149 Cal. 662, 87 Pac. 62 (1906).

4. Pueblo Lands of City.

Pueblo lands of a city situated within the limits of an irrigation district, which by law are exempted from taxation for general purposes, if so situated as to be susceptible of cultivation by irrigation, and would be benefited thereby, although unoccupied and uncultivated, are liable to an assessment for purposes of the irrigation district, and may be sold by the district for unpaid assessments thereon. City of San Diego v. Linda Vista Irr. Dist., 108 Cal. 189, 41 Pac. 291, 35 L. R. A. 33 (1895).

The legislature may empower a city to make its pueblo lands liable for an assessment which is not imposed as a burden, but as its proportion of the expense incurred to secure a local benefit, which, in contemplation of law, equals or exceeds the charge imposed. City of San Diego v. Linda Vista Irr. Dist., 108 Cal. 189, 41 Pac. 291, 35 L. R. A. 33 (1895).

5. Railroad Right of Way.

Where a railroad corporation owns a right of way and station grounds within the boundaries of a proposed irrigation district, and quietly sits by and makes no objection or protest to the organization of such district or the confirmation of the same, such railroad company is concluded by the action of the board of county commissioners in including such right of way and station grounds within the district and the judgment of the district court confirming such district, and cannot, in a collateral proceeding, attack the jurisdiction of the district to assess such lands on the ground that the same were not benefited. Oregon Short Line R. Co. v. Pioneer Irr. Dist., 16 Idaho 578, 102 Pac. 904 (1909). See *ante* III, D and J, 2, and IV, E, this note.

The fact that the officials of an irrigation district neglect to assess the right of way and station grounds of a railroad company for certain years is not a reason why such right of way and station grounds are not subject to assessment by said district; and the company cannot defeat a future assessment by reason of the fact that its property was not assessed for any particular year or years prior to the assessment made. Oregon Short Line R. Co. v. Pioneer Irr. Dist., 16 Idaho 578, 102 Pac. 904 (1909).

The power and jurisdiction of the state board of equalization with reference to the assessment of railroad property has reference to assessments made for general state, county, and municipal purposes, and not to assessments made for local improvements. Oregon Short Line R. Co. v. Pioneer Irr. Dist., 16 Idaho 578, 102 Pac. 904 (1909).

6. United States Lands.

Although the expense of a local improvement is usually borne by the re-

be advertised and sold in the event the assessment is not paid. The assessment can only be made upon property within the taxing district. We find, therefore, that the legislature has provided that only such portion of a railroad company's property as is situated within an irrigation district can be sold. As for a sale of a portion of a company's right of way being any more detrimental to the public interest than a sale of the

gion benefited (see Chew v. Board of Comm'rs of Fremont County, 18 Colo. App. 162, 70 Pac. 764—1902), yet where an irrigation district which has been formed so as to include within its boundaries lands belonging to the United States as a part of such irrigation district, the board of directors are not empowered to levy an assessment upon such lands of the United States. Nevada Nat. Bank v. Poso Irr. Dist., 140 Cal. 344, 73 Pac. 1056 (1903).

O. Sale of Land to Enforce Payment.

1. In California.

Under the California Wright Act, the collector of an irrigation district has authority to sell the property in case of nonpayment of the assessment thereon levied by the board; but the sale by him in satisfaction of an amount directed by the court is unauthorized, and vests no title in the purchaser at such sale. Boskowitz v. Thompson, 144 Cal. 724, 78 Pac. 290 (1904).

Where lands are sold to pay an assessment levied by an irrigation district by the collector of the district, and his right to that office is not called in question, the fact that, by reason of his residence, he might have been disqualified to become a *de jure* officer, will not invalidate the proceedings. Baxter v. Vineland Irr. Dist., 136 Cal. 185, *sub nom.* Baxter v. Dickinson, 68 Pac. 601 (1902).

Where land under an irrigation district is sold for nonpayment of assessments, the fact that the sale was made to enforce the payment of two separate assessments, and the amount of each assessment was not separately stated in the notice of sale, or the certificate of sale, or in the deed, will not have the effect to avoid the proceedings. Best v. Wohlford, 153 Cal. 17, 94 Pac. 98 (1908).

A sale of land to pay an assessment levied by an irrigation district under the provisions of section 26 of the Wright Act (Cal. Stats. 1887, p. 37), which requires the sale to commence on the day fixed for sale, or on some subsequent day to which the collector may postpone the same, a sale noticed for February 22, and made on February 24, was held not invalid because noticed for a legal holiday. Baxter v. Vineland Irr. Dist., 136 Cal. 185, *sub nom.* Baxter v. Dickinson, 68 Pac. 601 (1902).

2. In Washington.

Under the Washington District Irrigation Law (1 Ballinger's Ann. Codes & Stats., § 4192), the owner or person in possession of real estate offered for sale to pay assessments of a district due upon such land, may designate in writing to the secretary, prior to the sale, what portion of the property he wishes sold, if less than the whole; if the owner or possessor does not designate in writing or at all, the portion of the land to be sold to pay said assessments, it becomes the duty of the secretary of the irrigation district to so designate, but it is not necessary that the secretary file a separate written paper, his recital in the records of the sale of the designation made by him thereat, will be sufficient. Rothchild v. Rollinger, 32 Wash. 307, 73 Pac. 367 (1903). See Doland v. Mooney, 79 Cal. 137, 21 Pac. 436 (1889); Hewes v. McLellan, 80 Cal. 393, 22 Pac. 287 (1889); Southworth v. Edmands, 152 Mass. 203, 25 N. E. 106, 9 L. R. A.

whole, it is difficult to understand. We do not see how the railroad company, not being the public itself and not being the representative of the public, can complain if a taxing district sells less than the whole line of its right of way. The purchaser would acquire the same rights as the railroad company held, and would be entitled to operate trains over the road the same as they were previously operated by the original company.

118 (1890); State v. Galloway, 44 N. J. L. (15 Vr.) 145 (1882).

3. Misnomer—Effect on Tax Deed.

Under the California Wright Act, an assessment by an irrigation district, otherwise properly imposed upon the land, is not invalidated by a misnomer as to the owner thereof, and a tax deed on sale thereunder is not vitiated thereby. Escondido High School Dist. v. Escondido Seminary, 130 Cal. 128, 62 Pac. 401 (1900).

4. Restraining Sale.

In an action by a landowner to restrain the sale of his lands to pay an assessment levied by an irrigation district to meet the annual interest on bonds of the district, his action is a collateral and not a direct attack upon the validity of the organization of the district and of the issue of the bonds (Baxter v. Vineland Irr. Dist., 136 Cal. 185, *sub nom.* Baxter v. Dickinson, 68 Pac. 601—1902); and the holders of the bonds of the irrigation district may intervene on alleging that the defendant district is not defending in good faith; but where holders of a portion only of the bonds intervene, the holders of the balance of the bonds not being parties to the action, no decree can be entered adjudging such bonds invalid. Baxter v. Vineland Irr. Dist., 136 Cal. 185, *sub nom.* Baxter v. Dickinson, 68 Pac. 601 (1902).

In such an action, the burden is upon the plaintiff to establish the illegality of the assessment, but this he cannot do by a minute book of the district showing a resolution calling for special election for the assessment, and a resolution showing that the returns of that election were canvassed and the result recorded, but not showing that a notice of the election was given. Baxter v. Vineland Irr. Dist., 136 Cal. 185, *sub nom.* Baxter v. Dickinson, 68 Pac. 601 (1902).

P. Segregation of Fund.

Where, under the California Wright Act, a special levy is made and a lump sum of money is raised for a specified purpose, the board of directors have no power to segregate this sum into several funds corresponding to the purposes specified, the whole sum being equally applicable to the payment of indebtedness incurred for any of the purposes for which it is provided. Carter v. Tilghman, 119 Cal. 104, 51 Pac. 34 (1897).

A warrant in form made payable out of a designated fund segregated by the board of directors from a lump sum raised by special tax is payable out of any funds accruing from said tax in the hands of the treasurer. Carter v. Tilghman, 119 Cal. 104, 51 Pac. 34 (1897); Higgins v. San Diego, 131 Cal. 294, 303, 63 Pac. 470 (1901).

A warrant issued prior to the levying of a special tax to create a lump fund out of which to pay obligations of a specified kind of the district, is no objection to its payment where the indebtedness for which issued belongs to one of the classes specified. Carter v. Tilghman, 119 Cal. 114, 51 Pac. 34 (1897).

Q. Validity—District de Jure.

On the validity of an assessment levied by an irrigation district does not depend for its validity on the *de jure* character of the corporation and it is immaterial whether the district be a district *de jure*

It makes no difference to the public whether one company or another is operating a railroad system. But this discussion of the sale of fragments and subdivisions of a railroad right of way for local assessments is purely theoretical and imaginary. It has almost uniformly arisen in cases where the company was seeking to prevent a sale. The cases are extremely difficult to find, as a matter of fact and in practice, where a

or *de facto*. Quint v. Hoffman, 103 Cal. 506, 37 Pac. 514 (1894).

VIII. Powers, Duties and Liabilities.

A. The Powers of.

Irrigation districts organized pursuant to any of the acts authorizing the creation of such districts are purely creatures of the statute under which formed and have such powers and only such as are expressly granted by the statute or are impliedly necessary for the performance of the statutory duty of the districts. Willow Springs Irr. Dist. v. Wilson, 74 Neb. 269, 104 N. W. 165 (1905); Candelaria v. Vallejos, 13 N. M. 146, 81 Pac. 589 (1905); Little Walla Walla Irr. Dist. v. Preston, 46 Or. 5, 78 Pac. 982 (1904). They cannot by contract limit their legality to public. See Colorado Canal Co. v. McFarlan, 15 Tex. Ct. Rep. 848, 94 S. W. 400 (1906). Compare Moore-Cortes Canal Co. v. Guile, 36 Tex. Civ. App. 442, 82 S. W. 350 (1904). The board of directors of an irrigation district, acting for the district, has jurisdiction and can deal with matters affecting the district, as a whole only. Thus, it has been held that where an injunction was procured by a district, against parties within the district, restraining them from taking water from the ditches of the district, and this injunction was violated, resulting in injury to all the landowners entitled to water from the ditches of the district, a proceeding for contempt for violation of the injunction can not be maintained by the district, in the absence of proof of actual or special damages to the district as an organization separate and distinct from the rights of the landowners within the district. Thompson v. McFarland, 29 Utah 455, 82 Pac. 478 (1905).

B. The Duties of.

1. Generally.

The duties devolving upon an irrigation district are such as are imposed by law and necessary for the proper conduct of the business for which the district is organized, and none other. Thus, it is the duty of the district to keep the canals in repair so as to carry water to the several consumers along the line thereof, and to turn the water to the consumers out of its main canals or laterals at such place or places as will be most convenient for the consumers, and will cause the least waste by sepage or extravagance. Niday v. Barker, 16 Idaho 73, 101 Pac. 254 (1909).

Under the Idaho Law, an irrigation district is not required to construct and keep in repair at all times for public use bridges across their canals, flumes or water pipes, but is required to provide bridges across public streets and roads, where their canals or ditches are extended across roads or streets already in existence. MacCammelly v. Pioneer Irr. Dist., 17 Idaho 415, 105 Pac. 1076 (1909).

2. To Supply Water.

One of the duties of an irrigation district is to supply water to the landowners within the district; but a refusal to pay for the use of water, according to the regulations of the district, is a breach on the part of the water-users entitling the district, in the absence of legally established rates, to sue for the reasonable value of the services rendered. Lassen Irr. Co. v. Long (Cal., Dec. 24,

railroad company has suffered a sale either of its whole line or any portion thereof for a local assessment. The company that cannot pay a local assessment is not able to operate its road anyway, and a company that will not pay, after it has been judicially determined that it should do

1909), 106 Pac. 409. See De Prosse v. Royal Eagle Distilleries Co., 135 Cal. 408, 67 Pac. 502 (1902); Leavitt v. Lassen Irr. Co. (Cal., Dec. 24, 1909), 106 Pac. 404; South Boulder & R. C. Ditch Co. v. Marfell, 15 Colo. 302, 25 Pac. 504 (1890).

Depriving a landowner within a district of water agreed upon and provided for his land, is a taking of his property without just compensation within the prohibition of section 14, art. I of the Idaho Constitution. Knowles v. New Sweden Irr. Dist., 16 Idaho 217, 101 Pac. 81 (1908).

The right of a landowner of the district to the use of the water acquired by the district is a right to be exercised in consonance with and in furtherance of the ultimate purpose of the district,—namely, for the improvement by irrigation of lands within the district,—and in no other way. His right is always in subordination to the purpose of the trust. So far only as he proposes to use the water for the irrigation of lands within the district, can he be held to be the owner of any share or portion of the water. Jenison v. Redfield, 149 Cal. 500, 87 Pac. 62 (1906).

Assignment of the right to the whole or any portion of a share of water a landowner within the district is entitled to, may be made, but the owner cannot make an effectual transfer of such share or part of a share free from the trust by which it is incumbered. It still remains subject to the trust, and for that reason can be used for the irrigation of lands within the district only. Jenison v. Redfield, 149 Cal. 500, 87 Pac. 62 (1906). This is thought not to be contrary to anything held in Modesto Irr. Dist. v. Tregea, 88 Cal. 334, 353, 26 Pac. 237 (1891).

Under the Idaho Constitution (art. XV, § 4), a person cannot acquire a perpetual water right beyond the carrying capacity of the canal; and the aggregate rights of the users of water cannot exceed the capacity of the canal; and any temporary deliveries of water at times when the prior users are not demanding the full amount of water to which they are entitled cannot be turned into a perpetual water right by the persons to whom such deliveries are made. Gerber v. Nampa & Meridian Irr. Dist., 16 Idaho 1, 100 Pac. 80 (1908).

The Idaho Session Laws 1899, p. 382, § 19, prohibit a water company from contracting to deliver more water than its canal will carry. Gerber v. Nampa & Meridian Irr. Dist., 16 Idaho 1, 100 Pac. 80 (1908.)

And under the section of the constitution above referred to, providing for sale, rental, or distribution of water, and also providing that such sale, rental or distribution when once made shall be deemed an exclusive dedication to such use, it was not intended to compel a canal company that already had sufficient customers to use all the water the capacity of its canal would carry, to perpetually furnish water to anyone to whom it had furnished water at times when its regular customers did not require it. Gerber v. Nampa & Meridian Irr. Dist., 16 Idaho 1, 100 Pac. 80 (1908).

Where an irrigation district, under the apportionment of benefits by reason of the purchase of a canal system, to the lands under it, classified the benefits under the heads of "old water" and "new water," the term "old water" refers to existing rights at the time of the purchase of the canal and "new water" refers to rights yet to be acquired by the enlargement of the canal, and no benefits under the head of "old water" were ap-

so and that it is legally bound to do so, ought to be put out of business and succeeded by one that is law-abiding. Fortunately, and to the credit of the railroad companies operating in this state, it has never been found

portioned to the lands of those not already receiving water; and where it appears that the canal has not been enlarged so as to acquire any new water, and it does not appear that the canal company has water sufficient to supply the demands of a claimant without interfering with the use of private users, such claimant cannot acquire a perpetual water right by the temporary use of water from said canal at times when prior users are not demanding the full amount of water to which they are entitled. Gerber v. Nampa & Meridian Irr. Dist., 16 Idaho 1, 100 Pac. 80 (1908).

Where a party is entitled to water from a ditch company, and does everything that the constitution and the laws of Idaho require him to do in order to get it, the company is bound to deliver the water to him, and cannot require him to sign a special contract binding him to do things which the law does not require him to do in order to get the water. Green v. Byers, 16 Idaho 178, 101 Pac. 79 (1909).

Where water has been delivered to land under a rental and distribution, and has been applied by the landowner under such rental for the purpose of raising crops, the right to its use becomes a dedication, under section 4, art. XV Idaho Constitution, and the user and consumer is entitled to the continued use thereof on payment of the water rates established in conformity with law. Niday v. Barker, 16 Idaho 73, 101 Pac. 254 (1909).

In an action to compel an irrigation company to furnish water to an applicant therefor, if the application be for land which had not previously been irrigated, then it is incumbent upon the applicant to allege and prove that the canal company has water flowing through its canal to which prior appropriators are not entitled. Gerber v. Nampa & Meridian Irr. Dist., 16 Idaho 1, 100 Pac. 80 (1908).

Where an irrigation company contracted with the owner of land for a right of way in consideration of which he was to have the privilege of purchasing water from it for the purposes of irrigation, and to which landowner the company supplied water for a term, but afterwards withdrew the same for the purpose of supplying it to others, mandamus will lie to compel the company to continue to supply water. Merrill v. Southside Irr. Co., 112 Cal. 426, 44 Pac. 720 (1896).

Where an irrigation company of a district wrongfully withholds from an individual who is entitled to water he may lawfully demand, the measure of damages is the value to plaintiff of the use of said right during the time he is deprived thereof, and it is not error to instruct the jury that the measure of plaintiff's recovery "is the value of the crop at the time the water was shut out of said canal, with the right to irrigate it from that time on to the end of the season, less the value of the crop, without the right to irrigate it from that time until the end of the season." Clague v. Tri-State Land Co. (Neb., May 21, 1909), 121 N. W. 570.

An irrigation district cannot be required to supply water to lands outside of the district; hence an assessed owner of lands, within an irrigation district entitled to the use of water, and as assignee of the water right of another landowner within the district, is not entitled to receive any portion of the water to which he is entitled, as landowner or as the assignee of another landowner, to be used upon lands situated outside of the district. Jenison v. Redfield, 149 Cal. 500, 87 Pac. 62 (1906).

But where the district does supply its surplus water for the irrigation

necessary to actually make any such sale in Idaho for a local assessment.

We discover no reason for granting a rehearing. Petition denied.

STEWART, J., concurs. SULLIVAN, C. J., thinks a rehearing should be granted.

of lands outside of the district, it will be entitled to shut off this supply whenever the landowners within the district require all of the water flowing in the district for the purpose of irrigating their lands. Gerber v. Nampa & Meridian Irr. Dist., 16 Idaho 1, 100 Pac. 80 (1908).

The fact that the district does supply water to lands outside of the district will not affect the validity of the organization of the district or of the bonds issued thereby. Settlers' Irr. Dist. v. Settlers' Canal Co., 14 Idaho 504, 94 Pac. 829 (1908).

C. The Liabilities of.

1. Generally.

An irrigation district has all the liabilities incident to a corporation of its character and such general liabilities as are fixed by law. Thus, where an irrigation district purchases water rights, ditches and a canal system, it takes them subject to all duties and burdens of which it has notice and which existed against the grantor. Knowles v. New Sweden Irr. Dist., 16 Idaho 217, 101 Pac. 81 (1908).

The district is liable for benefits accruing to the district for work and labor done within the district upon its system of canals, etc., which has been done by a contractor and for which bonds have been issued in payment; and this liability is separate and independent from its liability upon the bonds. Hughson v. Crane, 115 Cal. 404, 47 Pac. 120 (1896).

Where a contract is entered into which a board of directors of an irrigation district is authorized by law to make, and the district has received the benefits of the contract, it will be liable for the reasonable value of the services rendered, not exceeding the contract price, notwithstanding the fact that the contract was illegal because of the manner in which it was entered into. Lincoln & Dawson County Irr. Dist. v. McNeal, 60 Neb. 621, 83 N. W. 847 (1900).

2. To Be Sued.

An irrigation district has the right to sue and also the liability to be sued, and on judgments recovered thereunder. Miller v. Perris Irr. Dist., 85 Fed. 693 (1898); Board of Directors of Riverside County v. Thompson, 122 Fed. 860 (1903); Boehmer v. Big Rock Irr. Dist., 117 Cal. 19, 48 Pac. 908 (1897); Hewitt v. San Jacinto & P. V. Irr. Dist., 124 Cal. 186, 56 Pac. 893 (1899).

Where an irrigation district has been sued and judgment recovered against it, such judgment will be conclusive against not only the parties before the court but also against the property owners of the district and all parties who may thereafter be called upon to enforce the judgment therein rendered, as to all questions which were or might have been litigated in action. Board of Directors of Riverside County v. Thompson, 122 Fed. 860 (1903). But in California, the property of an irrigation district is exempt from sale on execution (see *ante* 1, H, 2, this note) and the only method by which the judgment can be enforced is by mandamus to compel the levy of an assessment upon the property within the district to pay the judgment. See *ante* VI, K, 2, b, this note.

3. As a Nuisance.

An irrigation ditch or canal constructed and maintained under the authority of law governing the organization and conduct of irrigation districts, cannot be deemed or declared to be a nuisance. MacCammelly v. Pioneer Irr. Dist., 17 Idaho 415, 105 Pac. 176 (1909).

WASHBURN v. INTER-MOUNTAIN MINING CO.

[Supreme Court of Oregon, June 28, 1910.]

— Or. —, 109 Pac. 382.

1. Conditional Sale Distinguished from Chattel Mortgage.

Agreement that party does sell, assign, transfer and set over to another a certain quartz mill, providing that until the entire purchase price be paid, title shall remain in the seller, is a conditional sale and not a chattel mortgage, although it be provided that the seller may, at his option, enter upon and take possession of the mill, etc., and sell the same in case of default, crediting the proceeds after deducting expenses.

2. Conditional Sale—Fixtures—Effect of Agreement as to Title.

Where mill is sold under condition that the title shall not pass until fully paid for, it remains personal property as between the seller and buyer although it be affixed to the realty.

3. Same—Subject to Lien.

Mill sold under condition that title shall not pass until fully paid for, affixed to the realty, becomes a fixture as to laborers without notice and is subject to their liens.

4. Same—Agreement as to Title—Effect on Third Parties.

Mill affixed to soil under conditional sale is, as to third parties without notice, a fixture and will be treated as such so far as rights of third parties are concerned.

5. Miners' Liens—Contents of Notice.

It is not necessary that lien notice state or proof show that labor for which lien is claimed was done on the mill or building to subject them to the lien.

6. Same—What Property Affected.

Reference to "roads, tramways, flumes, ditches and pipe lines," etc., in § 5668, B. & C. Comp. as amended in 1907, includes such appurtenances when not situated upon the mine, as those upon the mine are part of the realty and need not be specially mentioned.

7. Same—Mill and Mill Site Included.

Use of term "upon any mill site or mill used, owned or operated in connection with such mine" in § 5668, B. & C. Comp. prior to amendment of 1907, had reference to such mill site and mill not situated upon the mine, and the section as amended necessarily includes mill site and mill situated upon the mine.

8. Same—Right of Foreman to Lien.

Foreman of mine, who did general work, helped on different things, framed timbers and looked after the work, is entitled to a miner's lien.

9. Corporations—Effect of Knowledge of President and Manager.

A corporation is presumed to know the terms of an agreement made by its president and manager for its benefit.

10. Same—Knowledge of Director.

To affect a director of a corporation individually, knowledge must be brought home to him and he is not presumed to know the terms of an agreement made by the president and manager of the corporation.

11. Miners' Liens—Evidence to Sustain.

Evidence of one who employed men, directed their work, kept their time and was bookkeeper of the mine, that the claimants worked extracting ores and breaking ground in different places on the property, giving the whole amount due and the amounts paid the laborers, is prima facie sufficient to sustain a lien.

12. Same—Marshaling Assets to Satisfy.

It is only when there are two properties that the doctrine of marshaling securities can be invoked and it cannot be invoked where mines and mills constitute one property, and neither can be sold separately without a depreciation in value of the other.

Action to foreclose miners' liens, upon mines and mill in which it was contended that the mill, being subject of a conditional sale, was not subject to the liens. Judgment for plaintiff. Affirmed.

This is a suit to foreclose miners' liens. The defendant Inter-Mountain Mining Company was the owner of fourteen mining claims in Baker county, Or. W. L. Vinson, at the time of the acts complained of in the answer of Flack, was its president and manager. Between May, 1908, and June 14, 1909, plaintiff and the twenty other lien claimants mentioned in the complaint, under employment of the defendant company, performed labor upon the said mines, as a group, in constructing tunnels and performing other work for the development thereof, in search for gold. Upon the latter date, at suit of C. E. Bond, Robert D. Carter was appointed a receiver for defendant company, and thereupon took possession of the mines. Thereafter on June 23, 1909, the lien claimants filed in the office of the county clerk of Baker county, Or., notices of their liens upon the mines for such labor, under the provisions of section 5668, B. & C. Comp., as amended by the Laws of 1907, p. 293. Thereafter each of the other lien claimants assigned his claim to plaintiff, who, on July 30, 1909, brought this suit to foreclose the same. The defendant corporation and the receiver made no defense to the suit. Defendant Bond answered,

CASE NOTE.

Miners' Liens on Property, Held Under Contract of Conditional Sale.

Where a chattel such as a quartz mill is purchased under agreement that the title shall not pass until the full purchase price is paid, and which chattel is thereafter affixed to the land, the agreement amounts to a stipulation that as between the parties it should remain personalty until the price was fully paid. But when the chattel is affixed to the soil, the situation is changed as to the rights of third parties who are without notice of the terms of the agreement. Washburn v. Inter-Mountain Min. Co., principal case.

The rule that a conditional sale of a chattel is valid as well against third parties as against the parties to the transaction, relates to parties dealing with the property as a chattel and does not apply to third parties without notice of the condition, where the character of the property has been changed to realty by being affixed to the soil, and

alleging a laborer's lien, which was disallowed by the trial court, and he does not appeal. The defendant Flack answered, and besides denials, alleges affirmatively, that the twenty-stamp (quartz) mill, situated upon the mines, is personal property of which he is the owner. He asks that the court adjudge that it is not subject to the liens of plaintiff; and that the receiver be directed to release it to him, his contention being, that on May 2, 1908, he was the owner thereof, it being situated in Malheur County, Or.; and that on that day he entered into an agreement with W. L. Vinson for the sale of it to him in the following words (omitting the preliminary statement and signatures) viz.: "Now, therefore, in consideration of the sum of one thousand dollars ($1,000) in hand paid by the party of the second part to the party of the first part, the receipt whereof is hereby acknowledged and confessed, the said party of the first part has this day sold, assigned and disposed of and by these presents does hereby sell, assign, transfer and set over unto the said party of the second part the said mill consisting of one (1) twenty-stamp mill including building and all machinery, dies, tools and appurtenances thereunto belonging, except the dwelling house, blacksmith shop, two ore cars and three hundred feet of rails, upon the following terms and conditions, to wit: First. The said party of the second part hereby promises and agrees to remove said mill, building, machinery, tools and appurtenances unto property owned by him situated near the Rainbow mine, in the county of Baker and state of Oregon, as soon as may be hereafter, and to do all of said work free of charge to the party of the first part. Second. The said party of the second part hereby promises and agrees to pay to the said party of the first part the further sum of nine thousand dollars ($9,000) according to the terms and conditions of one certain promissory note bearing even date herewith, executed by the said party of the second part to the party of the first part as the balance of the purchase price of said mill and machinery, and that until the entire purchase

therefore, where a mill was delivered to a mining company under an agreement amounting to a conditional sale, but was attached to the realty so as to become a fixture, the mining company became, as to laborers without notice, the owner of the mill, and it with the mine became subject to liens of the laborers. Washburn v. Inter-Mountain Min. Co., principal case.

Where certain machinery, etc., was bought for use in a mine under contract providing that the title should not pass until the purchase price was fully paid, which machinery, etc., was delivered at the mine but part of it was never set up or affixed to the premises, it was held that the part not set up or affixed to the mine was not liable for miners' or mechanics' liens. The lien was sustained as to that part which was set up and affixed. Hamilton v. Delhi Mining Co., 118 Cal. 148, 50 Pac. 378 (1897).

Machinery purchased by one in possession of a mining claim under a contract to purchase the same, providing that if he failed to fulfil the contract, he could remove any machinery, etc.,

price shall have been paid, the title to the said mill and all machinery hereinbefore described shall be and remain in the party of the first part. Third. Upon the payment to the said party of the first part of the entire purchase price of said property, he hereby promises and agrees to satisfy and release unto the said party of the second part all claim, right and title in and to said mill and machinery. Fourth. It is further understood and mutually agreed by and between the parties hereto that time is of the essence of this contract, and that for any failure on the part of the party of the second part to make the aforesaid payments in accordance with the aforesaid promissory note, the said party of the first part may, at his option, enter upon and take possession of the aforesaid mill, machinery, tools and appurtenances, together with all improvements made thereon, either with or without process of law, and to sell the same either at private or public sale, after having given ten (10) days' written notice thereof by publication or otherwise, and to indorse upon said note after the payment of all expenses the money remaining from the sale thereof, it being distinctly understood that the party of the first part may, at his option, regard this merely as an option to purchase. Fifth. It is further understood and mutually agreed by and between the parties hereto that the covenants, stipulations and agreements herein contained shall be binding alike upon heirs, executors, administrators and assigns of the parties hereto as upon the parties themselves."

In July, 1908, the mill and buildings were moved by defendant company to the mines for the operation thereof and erected thereon, being permanently affixed to the soil. Additions were also made to the machinery and buildings at the same time, viz.: an engine, dynamo, concentrator, shafts, pulleys, etc., which were also permanently affixed to the soil, and in the month of February, 1909, Vinson duly assigned such

affixed by him to the claim by agreement of conditional sale whereby the title was not to pass until full payment made, is not subject to laborer's lien, although it was affixed to the realty. Jordan v. Myres, 126 Cal. 565, 58 Pac. 1061 (1899).

The lessors (so called) of machinery to be used in mine whereby they agree to transfer title upon payment of a certain amount, are not required to give notice required by Civil Code Procedure, § 1192, providing for notice of nonliability for work, etc. (but see amendment of 1907, Kerr's Bien. Supp.) Jordan v. Myres, 126 Cal. 565, 58 Pac. 1061 (1899).

When a chattel which was sold for that purpose has been affixed to the soil, the party dealing with reference to the realty upon which the chattel is situated without notice of a reservation of title in the agreement, will not be affected thereby, but as to him the chattel will be treated as a fixture. Hershberger v. Johnson, 37 Or. 109, 60 Pac. 838 (1900).

Where under agreement for the purchase of a mine and mill under the terms

agreement to the defendant company. Upon the trial a decree was rendered in favor of plaintiff. Defendant Flack appeals.

For appellant—A. D. Clifford.

For appellee—Gustav Anderson.

EAKIN, J. (after stating the facts as above). The first question for determination is whether the agreement between Flack and Vinson is a conditional sale or a chattel mortgage, and this must be ascertained from the intention of the parties as gathered from the language of the agreement. It recites that the first party "does hereby sell, assign, transfer, and set over unto the said party of the second part," etc. But it provides that, "until the entire purchase price shall have been paid, the title to the said mill and all machinery hereinbefore described shall be and remain in the party of the first part," clearly indicating a conditional sale. Such has been the holding of this court in several cases: Singer M. Co. v. Graham, 8 Or. 17, 34 Am. Rep. 572; Herring-Marvin Co. v. Smith, 43 Or. 315, 72 Pac. 704, 73 Pac. 340. The further stipulation in the agreement that "the said party of the first part may, at his option, enter upon and take possession of the aforesaid mill, machinery, tools, and appurtenances, together with all improvements made thereon, either with or without process of law, and to sell the same either at private or public sale * * * and to indorse upon said note after the payment of all expenses the money remaining from the sale thereof" does not constitute it a chattel mortgage, as the plain intention of the parties was that the vendor shall retain the title. Freed Furniture & Carpet Company v. Sorensen, 28 Utah 419, 79 Pac. 564, 107 Am. St. Rep. 731. Also, see note to this case in 3 Am. & Eng. Ann. Cas. 639. And as the mill was purchased by Vinson for the defendant corporation, for the operation of these mines, the title thereto remained in Flack as against both Vinson and the defendant company. And this is the result even though the chattel be permanently affixed to the freehold, the agreement being permitted to control. It is held in Alberson v. Elk Creek Mining Company, 39 Or. 552, 65 Pac. 978, that "Laterally, the strict rule that whatsoever is affixed to the soil partakes of the nature and becomes a part of the realty itself, has been much relaxed to meet the require-

of which the proposed purchaser was to take possession and any and all machinery and tools put upon or used in the mill or mine should become the property of the owners in case the proposed purchaser did not complete his purchase, it was held that one who furnished the machinery to the proposed purchaser under agreement that title should not vest until it was paid for, knowing that it was to be affixed to the mine, but not knowing the terms of the contract as to the ownership of improvements in case of default could recover machinery where the proposed purchaser failed to pay for the machinery and defaulted in the

ments of manufacturing industries and trade relations, so that now the question whether an article of personalty in its original state has become a part of the freehold depends upon three conditions: Annexation, real or constructive; adaptability to the use or purpose of the realty to which it is attached; and the intention of the party making the annexation to make it a permanent accession to the freehold."

No doubt it was the intention of both Vinson and the defendant company to make the building and mill a permanent accession to the freehold. But the agreement amounts to a stipulation that, as between the parties to the agreement, it should remain personalty until the price was fully paid. Landigan v. Mayer, 32 Or. 245, 51 Pac. 649, 67 Am. St. Rep. 521; Hershberger v. Johnson, 37 Or. 109, 60 Pac. 838. However, when the mill is affixed to the soil, the situation is changed as to the rights of third parties who are without notice of the terms of the agreement. When the chattel, which was sold for that purpose, has been affixed to the soil, a party dealing with reference to the realty upon which the mill is situated, without notice of the reservation in the agreement, will not be affected thereby; but, as to him, the mill will be treated as a fixture. The reason for this rule is that to hold otherwise would render uncertain land titles, endanger the rights of purchasers, and afford opportunities for fraud. The condition of the agreement, being unrecorded, is in the nature of a secret lien, which is contrary to the policy of our law. This rule is laid down by this court in Muir v. Jones, 23 Or. 332, 31 Pac. 646, 19 L. R. A. 441, where it was urged, as here, that the vendee of the chattel could invest the plaintiff with no better title than he himself had. Mr. Chief Justice Lord says: "We are unable to subscribe to this doctrine" and holds that while by agreement barns or other structures so attached to the soil as to become part of the realty, may be made to remain personal property, yet the general course of decisions is that a purchaser of land on which such fixtures are located must have notice of such agreement or he will be entitled to hold them as part of the realty. To the same effect, see Landigan v. Mayer, 32 Or. 245, 51 Pac. 649, 67 Am. St. Rep. 521; Union B. & T. Co. v. Wolf Co., 114 Tenn. 255, 86 S. W. 310, 108 Am. St. Rep. 903, and note to the latter case in 4 Am. & Eng. Ann. Cas. 1073, where the authorities are reviewed. It is true, as stated by counsel for defendant, that an agreement for the conditional sale of a chattel is valid as well against third parties as against the parties to the transaction. Singer M. Co. v. Graham, 8 Or. 17, 34 Am. Rep. 572. But that rule relates to parties dealing for the

agreement to purchase. Hendy v. Dinkerhoff, 57 Cal. 3, 40 Am. Rep. 107 (1880).

As to machinery, pumps, etc., of oil wells being trade fixtures and removable as such, see note to Perry v. Acme Oil Co., p. 99, vol. 1, this series.

property as a chattel, and does not apply to third parties without notice of the condition, where the character of the property has been changed to realty by being affixed to the soil. Also, as defendant contends, a mechanic's lien claimant must connect himself with the owner of the property. But Flack has no interest in the realty, nor does the lien reach the personalty, and, as to the laborers without notice, the defendant company was the owner.

It is not necessary that the lien notice shall state or the proof show that the labor for which the lien is claimed was done on the mill or building to subject them to the lien. Section 5668, B. & C. Comp., as amended (Laws 1907, p. 294) provides: "That when two or more mines * * * are claimed by the same person or persons and worked through a common shaft or tunnel * * * or at one mill, or other reduction works, then all the mines * * * and all roads, tramways, trails, flumes, ditches or pipe lines, buildings, structures or superstructures used or owned in connection therewith shall, for the purposes of this act, be deemed one mine." The reference in this language to "roads, tramways, flumes, ditches, and pipe lines," etc., includes such appurtenances when not situated upon the mine, as those upon the mine are part of the realty and need not be specially mentioned. And so the use of the term "upon any millsite or mill used, owned, or operated in connection with such mine," in section 5668, prior to the amendment of 1907, had reference to such millsite and mill not situated upon the mine, as is further shown by the subsequent language of that section. Therefore, the section as amended necessarily includes the millsite and mill situated upon the mine without being specially named.

It is further contended by defendant that the decision in Durkheimer v. Copperopolis Copper Co., 104 Pac. 895, precludes recovery by plaintiff Washburn upon his individual lien, for the reason that he was superintendent and manager of the defendant company. But the evidence does not disclose that he was superintendent or manager of defendant company. On the contrary, he testifies that he was foreman and did general work, helped on different things, made things, framed timbers, and looked after the work. On cross-examination he says his business was foreman and to see that the work was done in different places; that he framed timbers; helped the men; did this, that, and the other, to help the thing along; and that he took part in the erection of the mill. His employment comes directly within the holding in Flagstaff v. Cullins, 104 U. S. 176, 26 L. Ed. 704, that "he was the overseer and foreman

As to mechanic's liens on gas and oil wells, see note to Phillips v. Springfield Crude Oil Co., p. —, vol. 2, this series.

As to for what services mechanics' liens are allowed on mines, see note to Gray v. New Mexico Pumice Stone Co., p. 157, this volume.

of the body of the miners who performed manual labor upon the mine. He planned and personally superintended and directed the work. * * * His duties were similar to those of the foreman of a gang of track hands upon a railroad, or a force of mechanics engaged in building a house." This language is quoted with approval in Durkheimer v. Copperopolis Company, and distinguishes the case we are considering from the latter. It is also urged by defendant that Washburn must be presumed to know the terms of the agreement between Flack and Vinson as he was an officer and director of the defendant company. No doubt, the defendant company is presumed to know the terms of that agreement because its president and manager had notice and it was made for its benefit. Thompson on Corp. (2d Ed.), § 1673; § 1668. But not so as to Washburn, although he was a director. To affect him individually, knowledge must be brought home to him. He denies any knowledge that the sale was conditional, and there is no evidence that shows he had notice thereof. The statement in Holly Mfg. Co. v. New Chester Water Company (C. C.), 48 Fed. 889, that "it appears that some of the directors had positive knowledge of the terms of the contract with the Holly Company and, under the circumstances, notice thereof is to be imputed to them all," only means all as constituting the corporation and is not authority for holding that, in an individual matter, a director is charged with notice because the corporation is presumed to have notice on account of notice to another director.

It is said in Peckham v. Hendren, 76 Ind. 47, that knowledge is imputable to a corporation by the acts of its agent, but will not be imputed to an officer thereof in a transaction between him and the corporation in which he is acting for himself and not for it. To the same effect is Cook on Stock and Stockholders, § 727; Cook on Corp., § 727; Rudd v. Robinson, 126 N. Y. 113, 26 N. E. 1046, 12 L. R. A. 473, 22 Am. St. Rep. 816. It is urged that there is no evidence as to the kind of work or where it was performed by the claimants, or that the claims were not paid. But it appears from the evidence that Washburn employed the men, directed the work, kept their time, and was bookkeeper. He testifies, as to King, that he worked in the mine, extracting ores and breaking ground in different places on the property described in the complaint; gives the amount of his whole bill and says that he was not paid in full; that he has a balance due him of $87.80; that the total amount paid him was $59.75. Similar evidence is given as to each claimant, and is, at least, *prima facie* sufficient to sustain the lien. Defendant also contends that the plaintiff should be required to take satisfaction first by sale of the mines, in which Flack has no interest, and leave the mill for the satisfaction of defendant's claim, if the mines sell for sufficient to satisfy the plaintiff's claims. This is the rule where there are two

separate and distinct properties and they can be sold separately without depreciation of either. But the mines and mill constitute one property and neither can be sold separately without a depreciation in value of the other. It is only when there are two funds or properties that the doctrine of marshaling securities can be invoked. Neither is this relief suggested by the pleadings nor asked in the prayer of the answer. The facts, however, may be sufficient to entitle defendant Flack to be subrogated to the equities of the plaintiff upon the sale of the property or other stage of the proceeding, if such relief is sought.

We find no error in the rulings of the trial court. The decree is affirmed.

PERRY v. ACME OIL COMPANY.

[Appellate Court of Indiana. Division No. 2, June 22, 1909.]

44 Ind. App. 207, 88 N. E. 859.

1. Appellate Practice—Waiver of Error.

Assignments of error not discussed in appellant's brief will be deemed to be waived.

2. Pleading—General Denial.

Under general denial it may be shown that plaintiff has no title to the property for the conversion of which the action is brought, but that title thereto is in defendant.

3. Oil Lease—Uncertainty in Description.

A deed to prospect for oil and gas which does not specifically define the land granted is not void for uncertainty, but within certain limits gives the grantee the right to select the land, to the amount granted, upon which he may prospect.

4. Same—Right of Removal of Fixtures.

Machinery and fixtures placed on real estate leased for the purpose of drilling for gas and oil do not become permanent fixtures or part of the freehold, and the title thereto does not vest in the lessor upon a forfeiture of the lease.

5. Same—Expiration of Term—Removal of Fixtures.

Where the right to remove property "at any time" has been expressly reserved in an oil lease, such right is not unlimited as to time, but is limited to a reasonable time after the expiration of the lease.

6. Same—Forfeiture at Option of Lessor.

The forfeiture clause in an oil lease is for the benefit of the lessor, and he may avail himself of it or not as he sees fit. If he does not declare a forfeiture, the lease remains in force, and the lessee may enter upon the leased premises.

CASE NOTE.

Machinery, Pumps, etc., for Drilling Gas and Oil Wells Are Trade Fixtures and Removable by Lessee.

I. In General.

Where under provision of the lease, machinery must stay upon the ground until all royalties are paid, but giving right of removal after payment of royalties, the machinery does not lose its character as a removable fixture, and the only interest the lessors have therein is a lien for unpaid royalty. Cherokee Construction Co. v. Bishop, 86 Ark. 489, 112 S. W. 189, 126 Am. St. Rep. 1098 (1908).

Machinery and fixtures placed on real estate leased for the purpose of drilling for gas and oil do not become permanent fixtures or parts of the freehold by reason of such annexation as is necessary to develop the premises according to the terms of the lease, and title to such machinery and fixtures does not vest in the lessor because of a forfeiture of the lease. Perry v. Acme Oil Co., principal case.

Action to recover value of certain oil-well fixtures and machinery. Judgment for plaintiff. Affirmed.

For appellants—Mack & Son and Jay A. Hurdman.

For appellee—Joseph S. Dailey, Abram Simmons and Frank C. Dailey.

WATSON, J. This was an action brought by the appellee against appellants to recover the value of certain oil-well fixtures and machinery alleged to have been converted by appellants to their own use. To the complaint appellant the King Oil Company filed a general denial. Appellant Perry answered in two paragraphs—first, general denial; second, affirmative matter in avoidance of the contract. The issues were made upon the complaint and separate general denials of each of the appellants. The cause was tried before a jury. A verdict for appellee was returned in the sum of $800. Each appellant moved for a new trial, but the motions were overruled and judgment rendered on the verdict.

Under a gas lease giving lessee the right to remove fixtures, but also providing that if lessee abandoned the lease while there was a flowing well upon the premises, the same should be left in condition to be used by the lessor, the lessee, upon abandonment, cannot remove the casing, pipe, etc., where the result would be the cutting off of the supply of gas to the lessor. Ohio Oil Co. v. Griest, 30 Ind. App. 84, 65 N. E. 534 (1902).

Machinery in a drill house for the temporary purpose of boring a salt well, and removable without injuring the freehold, is not a fixture, and does not pass by a conveyance of the land. Bewick v. Fletcher, 41 Mich. 625, 6 Mor. Min. Rep. 117, 3 N. W. 162, 32 Am. Rep. 170 (1879).

Where a party having the right to remove a derrick and boring machinery removed parts and was preparing to remove the rest, when, upon the landlord's objecting to the removal, a contract was signed whereby the party removing the property promised to return and replace it in the same condition after he had used it elsewhere, if permitted to remove it, it was held that he was not by such contract estopped from claiming title and the right of possession of the property; that the promise to put it back was no relinquishment of right and no recognition of any title in the landlord; that, as the landlord had no title or right of possession to the property, the agreement was without consideration, and not binding upon the lessee. Bewick v. Fletcher, 41 Mich. 625, 6 Mor. Min. Rep. 117, 3 N. W. 162, 32 Am. Rep. 170 (1879).

While there are certain general principles applicable to cases arising between landlord and tenant, as to what annexations are removable and what are not, yet each case must in a great measure depend upon its own peculiar circumstances and the intention of the parties, and the time and manner of making the annexation, which will be of controlling influence in the correct disposition of the question. Conrad v. Saginaw Min. Co., 54 Mich. 249, 52 Am. Rep. 817 (1884).

Under a lease conferring exclusive right to produce oil and gas, permitting the lessee to go upon the land to make necessary erections, etc., with the right to remove any and all tools, boilers, engines, and all casings to the wells and drive-pipe if the lessor should refuse to pay a fair price therefor, it was held

The only assignments of errors discussed by appellants in their brief are, first, sustaining the demurrer to appellant Perry's second paragraph of answer; and, second, the refusal by the court to give instructions No. 2 and No. 7 requested by Perry. The other assignments of error are therefore deemed to be waived. Hamilton v. Hanneman, 20 Ind. App. 16, 50 N. E. 43; Hoover v. Weesner, 147 Ind. 510, 45 N. E. 650, 46 N. E. 905; Ewbank, Appellate Practice, § 188.

The complaint is in one paragraph, and alleges the corporate existence of the appellee and the appellant, the King Oil Company, under the laws of the state of Indiana. It further avers that on the 26th day of September, 1899, William M. Perry and wife executed and delivered to the appellee an oil and gas lease and contract whereby the Perrys granted to appellee one hundred acres in Wells county, Ind., for the purpose of drilling and operating for gas and oil, with full right to enter thereon and erect and maintain necessary buildings. Appellee avers that it entered upon said land in pursuance of said contract, and took posses-

that those articles retained their character of personalty after annexation to the land, and as such were subject to mortgage and conveyance by the lessee. Kribbs v. Alford, 120 N. Y. 519, 24 N. E. 811 (1890).

The tubing, casing, and drive-pipe of a gas or oil well are trade fixtures, and in regard to such oil and gas leases are not governed by the same rules as apply to agricultural leases. They may be removed at any time before the expiration of the lease or when the lease has been abandoned, the land producing neither gas or oil. Silver v. Globe Window Glass Co., 21 Ohio Cir. Ct. R. 284, 11 Ohio Cir. Dec. 784 (1900).

In Shellar v. Shivers, 171 Pa. St. 569, 18 Mor. Min. Rep. 260, 33 Atl. 95 (1895), McIlvaine, P. J., in court below, said: "I do not think there can be any doubt that the casing in an oil or gas well, the derrick, and other appliances used in drilling and operating it, are trade fixtures, and can be removed by the owner or lessee during the term of the lease. On the other hand, I think there can be no doubt that they are such fixtures, that they become the property of the landowner, if not removed by the lessee during the term, or at least within a reasonable time after its expiration. These two propositions are both, of course, subject to modification by the agreement of the parties. Are they modified in this case? Because, if they are not, then the defendants had no right to enter upon the plaintiff's land for the purpose of removing the fixtures in question. The lease provides that the lessee shall have 'the right to remove, at any time, any or all machinery,' etc, It is claimed that the words 'at any time' must be given their fullest meaning, and that the defendants' right to remove these fixtures, by agreement of the lessor, was unlimited as to time, and that although their entry to remove the casing was made four years after the lease expired, and five years and six months after the well was completed and found to be of no use as an oil or gas well, yet their entry and purpose were lawful as they had the right to remove any or all fixtures at any time. We think that this was not the intention of the parties, as gathered from the language of the lease. The lease was for a fixed period, to be extended to an indefinite period, and the extension to depend upon what the future might develop. The right to enter at any time, and the right to remove

sion thereof for the purpose above set out, and drilled and completed two wells thereon, and equipped said wells with casings and drive pipe to the value of $928.30, and that appellants took possession of said wells, casing, drive pipe, and other materials, and wrongfully and unlawfully converted them to their own use. To this complaint appellants filed separate demurrers, but no rulings were had thereon. Appellant the King Oil Company then filed its separate answer in general denial, and William M. Perry filed his separate answer in two paragraphs—first, general denial; second, admitting that he and his wife executed said contract as set out in the complaint, and further averring that appellee submitted a blank printed form of contract for him and his wife to execute, which contained, among other provisions, the following: "The second party shall have the right, free of charge, to use sufficient gas, oil, and water to run all machinery for operating said well, also the right to remove all property at any time." That there was inserted therein in writing a provision as follows: "It is further agreed by second party

machinery at any time, was predicated of that part of the term that was uncertain; that is, after three years the lessee had the right, at any time, to enter and drill additional wells, if oil or gas was being produced in paying quantities, and had the right, although the three years had passed, to remove the machinery and fixtures after or when the well should cease to produce oil or gas in paying quantities. If this construction is correct then the rule of law as to removal of fixtures would be as in cases where the tenancy is uncertain in duration, as when it depends upon a contingency, and that is that the removal must be made within a reasonable time, or, in other words, the law in such cases allows the tenant a reasonable time for the removal of fixtures. Here the lessees, if oil or gas had been found in paying quantities, would have had a reasonable time within which to draw their casing and remove their derricks after it had become apparent that the operation of the wells was no longer profitable, let this be soon or long after the expiration of the three years. At any time when they thought it would no longer pay to operate their wells, which had been producing oil or gas in paying quantities, they had a right to remove the fixtures connected with such wells. Under the facts as we have them in this case, however, operations ceased on this lease in April, 1887. A dry hole was found. Nothing was done between the completion of this well and the time when the lease expired, in November, 1888; and after that four years are allowed to expire before an attempt to remove these fixtures was made. In our opinion, this was too late. If, under the words 'at any time,' the lessee could take four years after the expiration of the lease to remove his fixtures, he could as well take twenty years. To say that the lessor could prevent this by giving notice that the fixtures must be moved within a certain time is to read something into the contract that is not there."

The landlord under a gas and oil lease does not acquire title to personal property of lessee left on the premises, by judgment in ejectment. Sattler v. Opperman, 14 Pa. Sup. Ct. 32 (1900).

Under lease for purposes of exploring for gas and oil, engine, wooden oil-well rig, wooden oil tanks, casings, pipes, belting, and articles of like character,

that when they fail to operate any one well for a period of sixty days, or pay first party one dollar per day from the time they fail to operate said well, the ten acres on which said well is located shall be canceled and returned to first party. Second party shall have the right to remove their machinery from the said ten acres." And that appellee on the 12th day of December, 1902, ceased to operate said two wells, and wholly abandoned the premises, and removed therefrom all of its machinery, and so remained therefrom thereafter. That on the 15th day of April, 1903, he took possession of said wells, casing, and drive pipe, and employed his codefendant to operate the wells. Appellant further avers that he did not appropriate to his own use any machinery belonging to the appellee, but only property which was attached to and formed part of the real estate and which could not be removed therefrom without damage. To this second paragraph of answer appellee filed a demurrer which was sustained by the trial court and proper exceptions reserved as to the ruling thereon. Under his answer of general denial, appellant

necessary in the prosecution of the work, do not become permanent fixtures, and are removable by the lessee. Gartland v. Hickman, 56 W. Va. 49, 49 S. E. 14, 67 L. R. A. 694 (1904).

II. Where Lease Is Forfeited.

A tenant has the same right of removal of fixtures where, after the expiration of the lease he remains in possession as a tenant at will, as he had during the term. Brown v. Reno Electric L. & P. Co., 55 Fed. 229 (1893).

The rule that a lessee must remove his fixtures during the term does not apply where a lease is forfeited, for in such case, the term is not closed by the act of a tenant, and he should have a reasonable time thereafter within which to remove his fixtures. Updegraff v. Lesem, 15 Colo. App. 297, 20 Mor. Min. Rep. 620, 62 Pac. 342 (1900).

Under a lease providing for removal of fixtures and appliances upon forfeiture it is not error for the court to refuse to permit casings in oil wells to be removed when the effect of such removal would be to destroy the well. Powers v. The Bridgeport Oil Co., 238 Ill. 397, 87 N. E. 381 (1909).

Under a lease giving the right of removal of mining machinery, etc., and also providing that a discontinuance of work for twelve months should work a forfeiture of the lease, the lessee had the right to remove the fixtures during the term; but where he abandoned the lease without removing the fixtures, they became the property of the landlord, and were not thereafter liable to be levied upon for debts of the lessee. Davis v. Morse, 38 Pa. St. 346 (1861).

Where a lease is forfeited, the lessee has a reasonable time thereafter within which to remove his fixtures. Cassell v. Crothers, 193 Pa. St. 359, 20 Mor. Min. Rep. 160, 44 Atl. 46 (1899).

Where the landlord enters and terminates a tenancy at will, he acquires no right to the tenant's fixtures, and is liable for their value if he takes and converts the same. Cassell v. Crothers, 193 Pa. St. 359, 20 Mor. Min. Rep. 160, 44 Atl. 46 (1899).

Where an oil and gas lease provides that machinery, etc., may be removed by the lessee he has the right to do so although he may have defaulted in other covenants of the lease. He may have failed to fulfil his contract obligation to develop wells, etc., but that would not

Perry could have shown all the facts set out in his second paragraph of answer tending to defeat appellee's claim to the property. Ford v. Griffin, 100 Ind. 85, 87; Swope v. Paul, 4 Ind. App. 463, 31 N. E. 42, and cases there cited; Nowlin v. State, 30 Ind. App. 277, 280, 66 N. E. 54. It was not reversible error, therefore, to sustain the demurrer to the second paragraph of answer. Wickwire v. Town of Angola, 4 Ind. App. 253, 30 N. E. 917; Kelley v. Kelley, 8 Ind. App. 606, 34 N. E. 1009; Crum v. Yundt, 12 Ind. App. 308, 40 N. E. 79; Board v. State, 148 Ind. 675, 48 N. E. 226.

The terms of the lease pertinent and necessary to the determination of the questions herein involved have been set out *verbatim* above in the statement of the complaint. Appellee contends that the above-quoted clause providing for cancellation of the lease in the event of failure to operate the wells for sixty days or pay one dollar per day from the time of such failure is unenforceable because of uncertainty in the description of the tracts to be released. It may well be under the authorities cited by appellee that an action to quiet title to the 10-acre tracts would lie because of uncertainty in the description. But the case at bar is not one of that kind. It is a suit for conversion of personal property. By the terms of the lease appellee covenanted to surrender the 10-acre tract upon which any well was located upon failure for sixty days to operate said well or pay one dollar per day from the time of such failure to operate. Within limits, this gave appellee the power to select the ten acres which said well would be deemed to hold. In the case of Jones v. Mount, 166 Ind. 570, 77 N. E. 1089, the court said: "It is obvious that such a case as this does not fall within the principle of that class of cases in which it is adjudged that nothing passes by the deed where the terms are so uncertain that the intention of the parties cannot be ascertained. It will be observed that the contract contains a

prevent the removal of personal property, the covenants being distinct. Patterson v. Hausbeck, 8 Pa. Super. Ct. Rep. 36 (1898).

Under a lease granting privilege of removal of fixtures at any time, the lessee has the right to remove them within a reasonable time after the lease becomes forfeited for nonpayment of rent. Gartland v. Hickman, 56 W. Va. 49, 49 S. E. 14, 67 L. R. A. 694 (1904).

III. Question of Agreement or Intent.

The removability of fixtures is not controlled by their size or manner of erection or fixing to the property, but by the question whether they are designed for the purposes of trade or not. Van Ness v. Pacard, 27 U. S. (2 Pet.) 137, 7 L. Ed. 374 (1829); Seeger v. Pettit, 77 Pa. St. 437, 18 Am. Rep. 452 (1875).

The right of removal of fixtures from a mining claim is subject to the agreement of the parties or to the local custom and usage. Merritt v. Judd, 14 Cal. 59, 6 Mor. Min. Rep. 62 (1859).

There is no universal test whereby the character of what is claimed to be a fixture can be determined in the abstract. Neither the mode of annexation nor the

covenant upon the part of the grantee to surrender. This, within limits, gave the grantee the power of selection, and the mere fact that the land which he might select to reconvey was originally uncertain does not prevent an enforcement of the undertaking according to its terms"—citing Smith v. Furbish, 68 N. H. 123, 44 Atl. 398, 47 L. R. A. 226; Gardner v. Webster, 64 N. H. 520, 15 Atl. 144; Dull v. Blum, 68 Tex. 299, 4 S. W. 489; Nye v. Moody, 70 Tex. 434, 8 S. W. 606; Dohoney v. Womack, 1 Tex. Civ. App. 354, 19 S. W. 883, 20 S. W. 950; Waters v. Bew, 52 N. J. Eq. 787, 29 Atl. 590; Lane v. Allen, 162 Ill. 426, 44 N. E. 831; 1 Jones, Real Property in Conveyancing, 334. Continuing the opinion, the court further said: "There is no more legal uncertainty in such a matter as this than there is in the case of a way of necessity, where the reservation is implied as resting on the presumed intention of the parties." Therefore, since appellee had the power to select the particular tract to reconvey, it cannot be heard to say that the clause is unenforceable because of uncertainty in the description. Machinery and fixtures placed on real estate leased for the purpose of drilling for gas and oil do not become permanent fixtures nor parts of the freehold by reason of such annexation as is necessary to develop the premises according to the terms of the lease, and title to such machinery and fixtures does not vest in the lessor because of a forfeiture of the lease. Montpelier Light & Water Co. v. Stephenson, 22 Ind. App. 175, 53 N. E. 444; Gartland v. Hickman, 56 W. Va. 75, 49 S. E. 14, 67 L. R. A. 694; Siler v. Globe Window Glass Co., 21 Ohio Cir. Ct. R. 284. Where the right to remove property "at any time" has been expressly reserved in the lease, such a right is not unlimited as to time, but is limited to a reasonable time after the expiration of the lease. Shellar v. Shivers, 171 Pa. 569, 18 Mor. Min. Rep. 260, 33 Atl. 95. It has been decided in this state that where a lease provided for the drilling or operating of oil or gas wells, or, on failure to so drill or operate, to pay an agreed sum per day to the lessor for such failure or delay, and with the further provision that upon failure to drill or operate, or pay the agreed sum, the lease to become null and void, such a provision is for the benefit of the lessor, and he may either declare a forfeiture of the lease or proceed against the lessee for failure to perform the covenants of the lease.

manner of use is in all cases conclusive. It must usually depend upon the express or implied understanding of the parties concerned. Wheeler v. Bedell, 40 Mich. 693 (1879).

The question as to whether certain fixtures are or are not part of the realty may depend upon the intention of the parties, and they may not become a part of the realty although attached by masonry or other permanent means if the intention of the parties was that they should remain the personal property of the lessee. Lake Superior Ship Canal, etc. Co. v. McCann, 86 Mich. 106, 48 N. W. 692 (1891).

Hancock v. Diamond Glass Co., 162 Ind. 146, 152, 70 N. E. 149. To the same effect, see also, Edmonds v. Mounsey, 15 Ind. App. 399, 18 Mor. Min. Rep. 384, 44 N. E. 196 and cases cited; Woodland Oil Co. v. Crawford, 55 Ohio St. 161, 44 N. E. 1093, 34 L. R. A. 62; Wills v. Manufacturers' Nat. Gas Co., 130 Pa. 222, 18 Atl. 721, 5 L. R. A. 603; Thornton, The Law Relating to Oil and Gas, § 151. In the case at bar it does not appear that appellant took any steps to declare a forfeiture or give appellee any notice of such an intention. Consequently at the time when appellant Perry refused to permit appellee to enter the leased premises for the alleged purpose of drawing the pipe from the wells the lease was still in effect, and the title to the fixtures used in operating the wells was in appellee. Therefore the trial court did not err in refusing to instruct the jury that title to the fixtures vested in appellant Perry after sixty days' failure to operate said wells or pay $1 per day in lieu thereof, or that the title vested in said Perry immediately upon the happening of such default. Hancock v. Diamond Glass Co., *supra*.

It does not appear that there was any reversible error on the part of the trial court. The judgment is therefore affirmed.

Judgment affirmed.

PEOPLE ex rel. CHAPMAN v. SACRAMENTO DRAINAGE DISTRICT.

[Supreme Court of California, March 24, 1909.]

155 Cal. 373, 103 Pac. 207.

1. Drainage Districts—Historical Review of.

History of the establishment, and development of reclamation or drainage districts in California.

2. Constitutional Law—Act Creating Drainage Districts.

Statute of 1905 (Sess. Laws 443, Hen. G. L. p. 374), creating the Sacramento Drainage District, containing lands situated in ten different counties, for the purpose of promoting drainage therein, providing for the election of commissioners with various duties and powers, for the levying of assessments on lands benefited to pay the cost of the reclamation thereof, and creating a board of river control with powers for straightening and controlling the Sacramento and San Joaquin Rivers, is not unconstitutional.

3. Same—Power of Legislature Over Drainage.

The legislature has the power to provide for the reclamation of overflowed land and to impose a tax thereupon in proportion to the estimated special benefits which those lands will receive from the work done.

4. Same—Work Must Be of Public Character.

To sustain such law it must appear that the character of the work is such that its performance confers some general benefit on the public as well as a private benefit on the landowner.

CASE NOTE.

Legal Character of Drainage and Reclamation Districts.

As to constitutional power to establish drains and drainage districts, see note to Chicago B. & Q. R. Co. v. Board of Supervisors of Appanoose County, *post*, p. 459.

As to source of power legislative power to drain lands, see note to Coffman v. St. Frances Drainage District, p. ——, vol. 3, this series.

As to notice required as due process of law, see note to Ross v. Board of Supervisors of Wright County, *post*, p. 358.

As to rule that public benefit and interest must be involved, see notes to Campbell v. Youngson, p. ——, vol. 2, this series.

As to inclusion or exclusion of lands in drainage district, see note to Hull v. Sangamon River Drainage District, *post*, p. 593.

As to whether action in regard to drainage is legislative or judicial, see note to Smith v. Claussen Park Drainage & Levee District, p. ——, vol. 2, this series.

As to power of commissioners, etc., see note to Seibert v. Lovell, *post*, p. 261.

As to conclusiveness of decision of

5. Swamp and Overflowed Lands—Extent of Jurisdiction Over—Arkansas Act—Mexican Grants.

The legislature of the state has jurisdiction over all overflowed lands in the state whether acquired under the Arkansas Act or by Spanish or Mexican grant.

6. Reclamation Districts—Not Corporations, But State Agencies—May Be Created by Special Laws.

A reclamation district is not a municipal corporation or a corporation for municipal purposes within the prohibition of article I, section 11, nor article II, section 6, of the Constitution, but is a governmental agency to carry out a specific public purpose.

7. Special Law—Necessity for.

A clear showing is required on the face of the law itself before the courts will say that a special law was not required.

8. Novel Litigation—Scrutinized with Care.

The fact that legislation is novel, demands of the court that it be scrutinized with exceptional care, but it does not dictate its condemnation.

9. State Control of Waterways—Assessment for Improving.

In the matter of governmental power and control, the water highways of the state do not differ from the land highways, and legislation which exacts contributions from lands adjacent to the inland waterways stands upon the same ground as that which exacts similar contributions for land highways.

10. Local Improvements—Power to Assess for.

The source of the power of the state to assess lands for local improvements is the governmental power of the state to tax, and to specially tax for a public purpose, where the work to be done will confer a special benefit upon the property of the particular landowner as distinguished from the general good which it will work to all.

11. Constitutional Law—Title of Act.

Where the act contains more than one subject-matter and the title does not express all, the whole act is not void. The purpose of requiring the subject-matter to be expressed in the title is to prevent and check deceptive litigation.

drainage commissioners and other officers, see note to Chapman & Dewey Land Co. v. Wilson, vol. 2, this series.

As to collateral attack on drainage proceedings, see note to Chapman & Dewey Land Co. v. Wilson, vol. 2, this series.

As to waiver of irregularities in drainage proceedings, see note to Smith v. Claussen Park Drainage & Levee District, p. —, vol. 2, this series.

As to bonds of drainage districts, see note to Sisson v. Board of Supervisors of Buena Vista County, p. ——, vol. 3, this series.

For historical review of reclamation districts in California, see People ex rel. Chapman v. Sacramento Drainage District, the principal case.

I. State Agencies.

Drainage and reclamation districts have been variously classed as public corporations, municipal corporations, *quasi* corporations, private corporations and in later cases declared not to be corporations, but state agencies for the accomplishment of state purposes and public work. The various cases and holdings are given in the following subdivisions.

If reclamation districts can be called corporations at all, they are properly called corporations for municipal purposes. That phrase means no more than that they are state organizations for state purposes. They are certainly not municipal corporations in the strict sense. They have not the power of local government, which is the distinctive

12. Reclamation Districts—Power to Abolish.

The legislature, having due regard to vested rights, may put all existing drainage or reclamation districts out of existence and create a board to manage all further reclamation.

13. Legislative Act—Presumption as to.

Where the taking of evidence is necessary before action by the legislature, the court will conclusively presume it was taken.

14. Reclamation Districts—Legislature May Fix Boundaries.

The legislature has power to fix a district for the drainage or reclamation of lands, without any hearing as to benefits, for the purpose of assessing upon the lands within the district the cost of a local public improvement.

15. Constitutional Law—Conferring Judicial Powers.

The creation of a board of drainage commissioners, with *quasi* judicial powers, that is, to hear and determine objections to and to equalize assessments, is not unconstitutional.

16. Same—Due Process of Law.

Where an opportunity to be heard either before or after the levying of the assessment is given, there is no taking of property without due process of law.

17. Drainage Commissioners—Qualifications of—Property Owner.

Owning property within the district is not such an interest as disqualifies one from acting as commissioner of the district.

18. Constitutional Law—Double Taxation—Special Assessments.

Special assessments for local improvement is not double taxation, for they are levied for the special benefit the land receives from the improvement in addition to the general benefits for which general taxes are levied.

19. Same—Impairing Obligation of Contract.

Obligation of contract is not impaired by a state changing its plans for the reclamation of overflowed lands, and creating new and different agents and mandatories.

20. Same—Elections in Reclamation Districts—Property Qualification.

A property qualification in order to be a voter at elections in drainage or reclamation districts does not violate a constitutional inhibition against requiring a property qualification for voters. The legislature permits the landowners to appoint their own agents, and the method which it imposes in making the selection is wholly within its own control.

purpose and distinguishing feature of a municipal corporation proper. All definitions of such include as essential a territory which is a portion of the state and the inhabitants thereof, and the purpose to furnish local government for such inhabitants and such territory. The law does not require inhabitants in a swamp land or reclamation district, and if there are residents, it in no way affects them as such. Those who own no land within the district are not affected by the organization at all. The owners and the only ones affected by the formation of the district may be nonresident aliens. Residents as such have no voice in the management of the supposed corporation. There is no local government beyond that exercised over a specific district whenever street work is done and property owners are charged with cost thereof. Certainly these districts are not municipal corporations as that term is used in the Constitution, prohibiting the formation of corporations by special acts. They are neither public nor private corporations as defined in the California Civil Code. They are special organizations to perform certain work which the policy of the state requires or permits to be done, and to which the state has given a certain degree of discretion in making the improvements contemplated. They are not

Quo warranto to test validity of drainage district formed by direct act of legislature. Judgment for defendant. Affirmed.

For appellant—U. S. Webb, Attorney General, Arthur C. Huston, W. H. Grant and C. E. McLaughlin.

For respondents—Devlin & Devlin, and George & Hinsdale.

HENSHAW, J. This is proceeding in quo warranto, brought under section 803, Code Civ. Proc. That section authorizes the attorney general in the name of the people of the state, upon his own initiative or upon that of a private person, to prosecute an action against any person "who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise within this state."

In 1905 (St. 1905, p. 443, c. 368), the legislature passed an act entitled "An act to create a drainage district to be called 'Sacramento Drainage District;' to promote drainage therein; to provide for the election and appointment of officers of said drainage district; defining the powers, duties and compensations of such officers and providing for the creation, division and management of reclamation, swamp land, levee, drainage and protection districts within said Sacramento Drainage District, and providing for levying and collecting assessments upon the lands within said

accurately corporations at all, but are so classed because many of the presumptions and rules which apply to corporations have been made applicable to them. They are public agencies which will cease to exist when the policy of the state has changed so that they are no longer required or when there is no further function for them to perform, and there is nothing in the Constitution relating to municipal corporations which would prevent the state from so changing its policy as to put them out of existence. People ex rel. Van Loben Sels v. Reclamation District No. 551, 117 Cal. 114, 48 Pac. 1016 (1897).

A reclamation district formed under the act creating a state board for reclamation of swamp and overflowed lands, which was required upon petition of owners of one-third in acreage of any swamp and overflowed land susceptible of one mode of reclamation, to cause surveys to be made and a plan of the proposed work made, and upon their approval the work to be done by contract and paid for out of the state swamp land fund, did not create a public corporation. These districts were merely tracts of land susceptible of one mode of reclamation for which reason, and because of which fact, specific work was to be done by the state board, which was, under certain contingencies, to assess the cost upon the lands of the district. They had no more resemblance to public corporations than benefited districts which are assessed for local improvements, such as opening and grading streets. No powers whatever were conferred upon the district or upon any officers thereof, nor were any duties imposed upon any one, which implied that a corporation had been created. The district was not organized, as a corporation, there was nothing to which corporate powers could be attributed. People ex rel. Van Loben Sels v. Recla-

drainage district." The provisions of this act, so far as material to the present consideration are as follows: The legislature created a drainage district, defining the boundaries thereof and the lands embraced therein. These lands are situated in the counties of Sacramento, San Joaquin, Solano, Yola, Colusa, Sutter, Yuba, Placer, Glenn, and Butte, and this territory embraces in part lands already organized into reclamation, drainage, swamp land, or levee districts. The act provides for the selection of drainage commissioners, nine in number, apportioned among the above-named counties. These commissioners are to be elected by the owners of real property within the district; each owner being entitled to cast one vote for each dollar's worth of property. Provisions are made for the conduct of these elections and the filling of vacancies which may arise in the board. With other powers, the board of drainage commissioners is given supervisory control over the proposed work of reclamation districts within the limits of the drainage district, is empowered "to approve or disapprove any plan of reclamation in any reclamation district, to compel the construction and maintenance of necessary reclamation works in reclamation districts, to appoint trustees of reclamation districts in case of vacancies, and in general, to do all other acts and things necessary or requisite for the full exercise of their powers, or necessary for the promotion of the reclamation of lands within the drainage district." In this connection power is expressly conferred "to supervise and control the formation, consolidation or division of reclamation districts within said drainage district." When necessary, the board

mation District No. 551, 117 Cal. 114, 48 Pac. 1016 (1897).

A reclamation district is a public agency created in furtherance of the public policy of the state, a public organization formed to perform certain work which the policy of the state requires or permits to be done, and is not either a public or private corporation. Reclamation Dist. No. 551 v. County of Sacramento, 134 Cal. 477, 66 Pac. 668 (1901); People ex rel. Chapman v. Sacramento Drainage District, 155 Cal. 373, 103 Pac. 307, principal case.

Drainage districts are local subdivisions of a state, created by law for the purpose of administering therein certain functions of local government, and the commissioners exercise a portion of the sovereign power of the state, being invested with the power of taxation, the power of eminent domain, and other functions of local government. People ex rel. Wetz v. Hepler, 240 Ill. 196, 88 N. E. 491 (1909).

It is competent for the state to raise up governmental agencies for enforcement of police power and for the purpose of enhancing revenues and carrying revenue laws into effect. The agency thus created is an arm of the state and a political subdivision of the state, and exercises prescribed functions of government and is not a private corporation in any sense. Mound City Land & Stock Co. v. Miller, 170 Mo. 240, 60 L. R. A. 190, 94 Am. St. Rep. 727, 70 S. W. 721 (1902).

A levee district is not a private corporation, but a political subdivision of the state which the state has the power to create under the police powers, and

may levy an assessment upon the lands within the district, and in the levying of such assessment the board is required to make an estimate of the sum necessary. It is then to appoint three disinterested persons as assessors. These assessors are to assess upon the land within the drainage district the sum so estimated by the board of drainage commissioners, and shall "apportion the same according to the benefits that will accrue to each tract of land in said district respectively by reason of the expenditure of said sums of money." The assessors are required to make their lists, describing the tracts of land assessed, with the names of the owners, if known, and the amount assessed against each tract. These lists are to be filed with the secretary of the board of drainage commissioners, who in turn shall forward to the county treasurer of each county the assessment list for such county, which shall be open to inspection by the public. Thereupon the board of drainage commissioners is to appoint a time and place for each county, when and where it will meet for the purpose of hearing objections to the assessments. Notice is to be given by publication for two weeks in a newspaper in the county, published nearest to the district. Any person believing himself to be injured by the assessment may present his grounds of objection thereto, and at its meeting the board of drainage commissioners shall hear the evidence offered touching the correctness or equity of such assessment, "and may modify or amend the same, and the decision of said board of drainage commissioners shall be final, and thereafter said assessment list shall be conclusive evidence that the said assessment has been apportioned according to the benefits that will accrue to each tract of land in said district and such assessment shall constitute a lien upon the lands so assessed." After thus equalizing the assessment, the moneys called for thereunder

as such subdivision it exercises the prescribed functions of government in the district. Morrison v. Morey, 146 Mo. 561, 48 S. W. 629 (1898).

Drainage corporations are public governmental agencies, and in no sense private corporations. Mound City Land & Stock Co. v. Miller, 170 Mo. 240, 253, 258, 70 S. W. 721, 94 Am. St. Rep. 727, 60 L. R. A. 190 (1902); State ex rel. Compton v. Chariton Drainage Dist. No. 1, 192 Mo. 517, 90 S. W. 722 (1905).

Under the authority conferred, the board exercises a police power for the promotion of the public health and welfare, and is not clothed with the corporate powers or privileges forbidden by constitutional provision prohibiting formation of corporations by special laws, although the act is clearly a special law. State ex rel. Baltzell v. Stewart, 74 Wis. 620, 43 N. W. 947, 6 L. R. A. 394 (1889).

Where the Constitution provides that the general assembly may pass laws permitting owners of lands to construct drains, etc., across lands of others and provide for reclamation districts, etc., the provision is not self-operative nor mandatory. The right results only after making compensation in damages, which in contemplation of law includes all loss or injury to the one whose land is so taken. There are none of the elements

are to be paid into the county treasury in instalments in such amounts and at such times as the board shall by order direct, sixty days being allowed for payment after such order. The board of drainage commissioners is authorized to begin suit in the superior court of the county where the land is situated for the collection of delinquent and unpaid assessments, and for the foreclosure of the lien upon the property in enforcement of such collection.

A board known as the "Board of River Control" is also created. This board consists of two members, appointed by the governor of the state, one of whom is to be the president of the board of drainage commissioners, and the other some competent civil engineer. The duties of the board of river control are, for the most part, advisory. This board has supervision of all levees and canals intended to do duty in disposing of flood waters. It is empowered to acquire from private owners or from reclamation, swamp land, or other districts, such rights of way, easements, and property as may be necessary for its purposes. It is the duty of the board to advise and consult with such board or officers as may be appointed by the government of the United States, to advise and construct works for the improvement and rectification of the channels of the Sacramento and San Joaquin Rivers and their tributaries. It is its duty also to examine all plans and specifications which may be prepared or adopted for the construction of the works for the controlling of flood waters or improvement of the channels of the rivers and their tributaries, and to submit a copy of all such plans and specifications to the state board of examiners for the latter's investigation and consideration. When called upon, the board is to confer and advise with the state board of examiners upon the matter of these plans.

of a contract. These corporations are not of a private character, but created by public act for public purposes, and clothed with power of a high order, and the law providing for their organization is subject to be changed, modified or repealed. Smith v. People, 140 Ill. 355, 29 N. E. 676 (1892); Hollenbeck v. Detrick, 162 Ill. 388, 44 N. E. 732 (1896).

II. Not Corporations.

Reclamation districts are not corporations in the ordinary sense of the term. If termed corporations at all, they have only such powers and such liabilities as are prescribed by the law which creates them. Hensley v. Reclamation Dist. No. 556, 121 Cal. 96, 53 Pac. 401 (1898).

The likeness of these state agencies to corporations is superficial, and the similitude, for it is no more than this, ceases if consideration be given to the fact that the state could accomplish this very work without organizing a district as such at all, and without giving the landowners within the district any voice in the selection of the managers or trustees. Thus it would be perfectly legal and competent for the legislature delimiting a tract of land, to appoint a commissioner or commissioners to perform all of the functions which, under existing schemes, are performed by the trustees and assessors. Reclamation Dist. No. 70 v. Sherman, 11 Cal. App. 399, 105 Pac. 277 (1909).

Within six months after the organization of the board of drainage commissioners, this board is to appoint a committee of three persons to act in conjunction with a similar committee appointed by the Governor of the State of California to determine the proportion to be borne by said district and state, respectively, of the cost of constructing and completing either the work recommended in the report of certain named engineers, or the work called for by such other plan as shall be approved by the state board of examiners. When this cost has been apportioned, and the apportionment approved by the board of drainage commissioners, the latter shall appoint three assessors—disinterested persons—who, in the manner above outlined, shall proceed to assess upon the lands within the drainage district the sum apportioned against said district as its proportion of the cost of the work. All the proceedings for the levying, equalizing, and collecting of such assessment are prescribed as above set forth. It is provided, however, that no part of this assessment shall be called in or collected "until the State of California and the Government of the United States, or one of them, shall have made an appropriation, or other legal provision, for the payment of the balance of the sum to be expended jointly with said district in performing the work according to the plans adopted, and in case payment of said sum by the state or by the United States shall not be provided for within five years from the time said assessment shall have been levied, said assessments shall become void, and the lien thereof upon the lands shall expire.". Provisions then follow for the formation of new reclamation districts within the area of the drainage district, under the supervision and control of the drainage commissioners, and for the consolidation of existing districts, under like supervision and control. And finally, it is provided that until legal provision has been made by the State of Cali-

Swamp land districts marked out under the Act of 1861 were not public corporations; they were merely tracts of land susceptible of one mode of reclamation, for which cause specific work was to be done by the state board, who were under certain contingencies to assess the cost on the lands of the district. They had no more resemblance to public corporations than benefited districts which are assessed for local improvements such as opening, widening, and grading streets. People ex rel. Van Loben Sels v. Reclamation Dist. No. 551, 117 Cal. 114, 48 Pac. 1016 (1897).

A reclamation district is not a private corporation, nor does the law authorizing it in any way constitute a private grant, and it may be altered, modified or repealed as the wisdom of the legislature may dictate. Smith v. People ex rel. Detrick, 140 Ill. 355, 29 N. E. 676 (1892).

Commissioners of levee districts are public, not corporate officers, and endowed with a corporate being only for the convenience of administering a public trust confided to them. The state has defined this trust and its attendant duties. Nugent v. Board of Mississippi Levee Comm'rs, 58 Miss. 197 (1880).

fornia or the Government of the United States for the payment of such proportion of the cost of the work as may be charged to them, or either of them, under the adopted plan, the powers of the board of drainage commissioners conferred by the act are suspended, excepting that the board may cause to be levied and collected an assessment, not exceeding the sum of $50,000, to be used in the furtherance of the general plan; and the powers of all boards of supervisors, trustees of reclamation and other districts are continued in force until the general powers of the drainage commissioners shall have become fully effective.

The purpose and scope of the act are clearly discernible from a reading of it. The causes which led to its enactment form a part of the history of the state. Riparian, or in proximity, to the great San Joaquin and Sacramento Rivers, are vast tracts of low-lying lands, some strictly swamp lands, others subject to overflow at the usual stages of high water, others liable to inundation in times of extraordinary freshet, but all requiring the expenditure of money in the construction of levees, drainage ditches, and pumping plants for their reclamation and subjection to economic use. Some of these lands, and indeed some embraced within the drainage district thus created, were acquired by the State of California from the United States under the Arkansas Act, and in turn were sold into private ownership by the state. Others came into the hands of private owners by mesne conveyances; the original source of such titles being the government of Spain or Mexico, whose grants were confirmed by the United States. Aside from any duty which it may be conceived that the State of California owed to the United States because of the trust upon which it took the lands under the Arkansas Act, it was clearly desirable and beneficial to the state that all of these

III. Creation by Special Laws.

An act forming a body corporate, with powers to build and maintain a levee, is not in contravention of the constitutional provision that legislature shall enact no special law where a general law can be made applicable, or that the legislature shall not by special act confer corporate powers. Keel v. Board of Directors of St. Francis Levee Dist., 59 Ark. 513, 27 S. W. 590 (1894).

If reclamation districts can be said to be corporations at all, they are public corporations for municipal purposes, and this means no more than they are state organizations for state purposes, and not municipal corporations in the strict sense of the word, or as that term is used in the Constitution. People ex rel. Van Loben Sels v. Reclamation District No. 551, 117 Cal. 114, 48 Pac. 1016 (1897).

A reclamation district is not a municipal corporation or a corporation for municipal purposes within the prohibition of article 1, section 11, nor article II, section 6 of the Constitution of California, but is a governmental agency to carry out a specific purpose. People ex rel. Chapman v. Sacramento Drainage District, principal case.

Reclamation districts are not municipal corporations within purview of the constitutional prohibition against creating municipal corporations by special

lands should be reclaimed for purposes of husbandry. This improvement would add great wealth to the state, and this improvement therefore would result in a public benefit. Upon the other hand, the specific lands thus reclaimed would be especially benefited by their enhanced and assured productiveness, and it was proper that such lands should bear the cost of the work of reclamation proportioned to the benefits which they would thus receive. Such being the condition, levee districts, drainage districts, and reclamation districts came into existence, some by special legislative enactment, others under general and permissive laws. One and all these laws had in view the same end, the reclamation of the lands from the excess of waters which poured upon them, and the opening of them to uses otherwise impossible, with the increase in settlement, population, and general prosperity which inevitably would follow. In time two impeding difficulties came to be perceived: (1) That, because of the great number of such small districts, each operated independently and under no general plan for the good of all, much money and labor were wasted. Since there was no common and harmonious plan of reclamation, one district frequently worked in antagonism to another. The operations or the neglect of one district might tend to imperil the existence of another; while the extravagant use of money made necessary because of the lack of concerted action and because each district was obliged to fight not alone the common enemy, the water, but perhaps equally an adjoining district, put burdens upon many of the districts which soon became intolerable, with the result that the districts themselves were sometimes abandoned, and their works fell into disrepair and disuse. (2) Owing to the sediment and debris settling upon the bottoms of these rivers, the plane of their water levels was heightened,

laws. People ex rel. Chapman v. Sacramento Drainage District, principal case; Reclamation Dist. No. 70 v. Sherman, 11 Cal. App. 399, 105 Pac. 277 (1909).

Laws providing for the formation of drainage districts, authorizing them to manage the affairs of the district, etc., is not unconstitutional as authorizing by special act the formation of a private corporation to improve private property. Mound City L. & S. Co. v. Miller, 170 Mo. 240, 70 S. W. 721, 94 Am. St. Rep. 727, 60 L. R. A. 190 (1902).

Acts of legislature conferring corporate powers upon mere state agencies, bodies of citizens who have no personal or private interest to be subserved, but are simply required by the state to do some public work, are not acts conferring corporate powers such as are referred to in the constitutional provisions prohibiting the conferring of corporate powers by special laws. State ex rel. Baltzell v. Stewart, 74 Wis. 620, 43 N. W. 947 (1889).

And see note I, C, to Chicago B. & Q. R. Co. v. Board of Supervisors of Appanoose County, *post*, p. 462.

IV. Political Subdivisions of State.

It is competent for the state to raise up governmental agencies for enforcement of its police power. The agency thus created is an arm and political sub-

to the increased endangerment of the adjacent lands. In times of flood it became more and more difficult for these rivers to carry and discharge their waters through the natural channels, and the condition soon became a matter of state and national concern. The Government of the United States primarily, and of the state secondarily, having in them vested the exclusive management and control of navigable waters, were confronted with the corresponding duty of preserving the two great inland water highways of the state. The accomplishment of this called for the deepening and the rectification of the river channels, matters exclusively of federal or state cognizance. In turn, however, such deepening and rectification, by enabling the rivers successfully to carry and dispose of their flood waters, would greatly facilitate the labor of reclamation imposed upon the owners of the adjacent lands. Thus, in outline, is presented the situation with which the state was confronted. Itself, or the federal government, or both, would take charge of the work of widening, deepening, and straightening the river channels. Itself, or the federal government, or both, would provide funds for the payment of this work. Upon the other hand, the lands adjacent to the rivers would be greatly and directly benefited by this work, and should be subject to special assessment to pay for the special benefit thus received. Such being the situation, it was deemed expedient by the state to form one large district, to the end that the commissioners of such district might by exercising supervisoral control over the smaller districts, and by adopting one general plan of reclamation, economize in expenditures, save the extravagant waste of moneys which had been a part of their past history, and by a general assessment over a large area materially lessen, perhaps, the burden which the landowners might otherwise be called upon to bear. These were the obvious reasons actuating the legislature in formulating the scheme in the act under consideration. It is to be considered whether the expression which they gave to their plan does violence to the Constitution.

division of the state, and exercises prescribed functions of government. Cribbs v. Benedict, 64 Ark. 555, 44 S. W. 707 (1897); Badgar v. Inlet Drainage Dist., 141 Ill. 540, 31 N. E. 170 (1892); Zigler v. Menges, 121 Ind. 99, 22 N. E. 782, 16 Am. St. Rep. 357 (1889); Mound City Land & Stock Co. v. Miller, 170 Mo. 240, 70 S. W. 721, 60 L. R. A. 190, 94 Am. St. Rep. 727 (1902); Taylor v. Crawford, 72 Ohio St. 560, 74 N. E. 1065, 69 L. R. A. 805 (1905); Donnelly v. Decker, 58 Wis. 461, 17 N. W. 389, 46 Am. St. Rep. 657 (1883); Roby v. Shunganunga Drainage Dist., 77 Kan. 754, 95 Pac. 399 (1908); Wurts v. Hoagland, 114 U. S. 606, 5 Sup. Ct. Rep. 1086, 29 L. Ed. 229 (1884); Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 17 Sup. Ct. Rep. 56, 41 L. Ed. 369 (1896).

V. Public Corporations.

A levee district formed by special act of the legislature, with power to make contracts, incur debts, employ servants and agents, and perform many other acts

1. The question of the power of the legislature, in a proper case, to impose a burden in the nature of a tax upon specific lands, in proportion to the estimated special benefits which those lands will receive from the work done, may not be doubted. The limitation upon its power, it is well settled, is this: That to sustain such a law it must appear that the character of the work is such that its performance confers some general benefit on the public as well as a private benefit on the landowner; and that the improvements here contemplated are of such character has long been definitely settled. So complete is the power of the state over swamp and overflowed lands that its power to provide for reclamation of them is not limited to those lands the title to which was acquired under the Arkansas Act; but it exists as to all swamp and overflowed lands in the state, even if the title was derived from a Spanish or Mexican grant. Hagar v. Yolo Co., 47 Cal. *222*; Hagar v. Rec. Dist., 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569; Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 163, 17 Sup. Ct. 56, 41 L. Ed. 369.

2. The act does no violence to article 1, section 11, nor to article 4, section 25, nor to article 11, section 6, of the Constitution of the state. That the district here organized, if it be considered a corporation at all, is not a corporation organized for municipal purposes within the contemplation of article 11, section 6, of the Constitution, must be taken as well settled. People v. Reclamation District 551, 117 Cal. 114, 48 Pac. 1016; People v. Levee District No. 6, 131 Cal. 30, 63 Pac. 676; Reclamation District v. County of Sacramento, 134 Cal. 477, 66 Pac. 668. It is unnecessary to repeat the reasons set forth in the decisions in those cases by which the conclusion there reached was expressed, to the effect that such districts are, in strictness,

which pertain to natural persons, is a public corporation, although not formed or organized for the government of a portion of the state in the broader sense of that term; but it exercises certain governmental functions within the district. Dean v. Davis, 51 Cal. 406 (1876).

Corporations formed for drainage purposes are public corporations. The objects contemplated by them are to be accomplished with funds raised by special assessment upon property benefited thereby. The power to make special assessments is referable to and included within the taxing power, and one of the requisites of lawful taxation is that the purposes for which contributions are demanded shall be public in their nature, although the formation of the district be by the voluntary affirmative act of the landowners and its organization for their benefit. It is not in its character and aims essentially a private corporation, and is in no sense a corporation *in invitum*. As a matter of course the organization is in part for the benefit of the landowners of the district, for the special assessments which may be made are limited to the property actually benefited and further limited to the extent of such benefits, but there is also a public benefit, and it is only by virtue of drainage being a matter of public importance that the involuntary

not corporations at all, but rather governmental agencies to carry out a specific purpose; the agency ceasing with the accomplishment of the purpose. But, additionally, it may be said that the likeness of these agencies to corporations is superficial, and that the similitude—for it is no more than this—ceases if consideration be paid to the fact that the state could accomplish this very work without organizing a district as such at all, and without giving the landowners within the district any voice in the selection of the managers or trustees. Thus it would be perfectly legal and competent for the legislature, delimiting a tract of land, itself to appoint a commissioner or commissioners to perform all of the functions which, under the existing schemes, are performed by the trustees and the assessors. In fact, historically, such was the original method adopted when, in the reign of Henry VIII., the first statute was passed providing for the construction of sewers, drains, and other improvements designed to reclaim swamp lands (St. 23 Hen. VIII., c. 5, par. 1 [1531]), and such is the method still adopted in many of the states of this nation. It is in accord with the progressive spirit of our government to give to the people, or some part of them, the largest possible control in matters peculiarly affecting them and their interests. It is a concession to this spirit, and not the compulsion of the law, which prompts the legislature to give the landowners so large a voice in the control of such affairs.

Nor, while a special act, is the law obnoxious to the other sections of the Constitution above cited. The considerations dictating the necessities of a special law are plain as above set forth. It would require a clear showing upon the face of the law itself that a special act was not required, before a court would interfere with the determination of a coordinate branch of the government upon this subject, and, generally, as is said in People v. McFadden, 81 Cal. 489, 22 Pac. 851, 15 Am. St. Rep. 66, the determination of such a matter "depends upon questions of fact which this court has no means of investigating, and upon the solution of which it would not attempt to substitute its judgment in place of that of the legislature."

landowners can be taxed for the improvement. Elmore v. Commissioners, 135 Ill. 269, 25 N. E. 1010, 25 Am. St. Rep. 363 (1890); Heffner v. Cass & Morgan Counties, 193 Ill. 439, 62 N. E. 201, 58 L. R. A. 353 (1901).

A reclamation district is a public corporation. People v. Reclamation Dist. No. 108, 53 Cal. 346 (1879); People v. Williams, 56 Cal. 647 (1880); Hoke v. Perdue, 62 Cal. 545 (1881); People v. Larue, 67 Cal. 526, 8 Pac. 84 (1885); Reclamation District No. 124 v. Gray, 95 Cal. 601, 30 Pac. 779 (1892); Swamp Land District No. 124 v. Silva, 98 Cal. 51, 32 Pac. 866 (1893); Angus v. Browning, 130 Cal. 503, 62 Pac. 827 (1900); McGillis v. Willis, 39 Ill. App. 311 (1891).

3. It is argued with much earnestness that no such law as this has heretofore ever been found upon the statute books, and that it should be condemned as unconstitutional, as being a covert attempt upon the part of the state, under the guise of assessment for special benefit, to force upon the unfortunate landowners the cost of the work for which alone the sovereign state should pay, the work of the improving of the channels of its navigable rivers. The fact that legislation is novel demands of a court that it be scrutinized with exceptional care; but it does not dictate its condemnation. It is true that the protection and development of its harbors and waterways (subject always to the paramount right of the United States) are matters of state consideration and control. It is true also that usually, since the work is for the general benefit of all of the people, the expense is met by the state itself; but it does not herefrom follow that in every case it is the legal duty of the state so to bear the burden. Whenever the legislature has spoken, the question before the court is not the propriety of its legislation, but its power to legislate. The harbor of San Francisco is benefited for purposes of navigation and commerce by a sea wall along the water front. At the same time it will not be questioned that the lands held in private ownership in close proximity to such sea wall, and which without such sea wall would be inundated "water lots," are especially benefited by this harbor work. The state, if it elects, may pay all the cost; but it will not be denied that the state has the power to impose upon the adjacent lands specially benefited by the work an assessment in proportion to such benefits, to defray a part of the cost. Or, again, in the matter of governmental power and control, the water highways of the state do not differ from the land highways. The power of the state to exact payment for the improvement of its streets from the owners of land adjacent thereto, in proportion to the benefits which their lands receive, is unquestionable and unquestioned. Legislation which in like manner exacts similar con-

VI. Municipal Corporations.

Drainage districts should be classed as municipal corporations. Commissioners of Drainage Dist. v. Kelsey, 120 Ill. 482, 11 N. E. 256 (1887); Elmore v. Drainage Commissioners, 135 Ill. 269, 25 N. E. 1010, 25 Am. St. Rep. 363 (1890); but with limited powers, Badger v. Inlet Drainage Dist., 141 Ill. 540, 31 N. E. 170 (1892); People ex rel. Gauen v. Niebruegge, 244 Ill. 82, 91 N. E. 115 (1910).

VII. Private Corporations.

A law providing for the construction of a levee, naming five persons as commissioners to construct the same, authorizing them to ascertain what lands within designated district were liable to overflow, and to levy a tax of not more than one dollar per acre against the owners for the purposes of carrying out the objects of the act, and declaring the commissioners a body corporate with perpetual succession and power to hold real and personal property, which act was never in any mode submitted to a vote of the inhabitants of the district embraced therein, and under which the

tribution from lands adjacent to the inland waterways for like considerations, stands upon the same ground, and for the same reason may not be successfully assailed. The two classes of legislation are congeneric and have their origin and draw their inspiration from the same power and source, the governmental power of the state to tax, and to especially tax for a public purpose, where the work to be performed will confer a special benefit upon the property of the particular landowner, as distinguished from the general good which it will work to all.

4. It is urged the act does violence to article 4, section 24 of the Constitution, in embracing more than one subject-matter and in not embracing in its title the principal subject-matter. The penalty which the Constitution imposes upon such legislation is to make void the matter which is not expressed in the title. This inquiry being in quo warranto, and the legitimate subject-matter of investigation being the usurpation by defendants into an office or franchise, it may be that the act contains provisions not germane to nor fairly embraced within the subject-matter of the title, but only in the event that such an unexpressed provision or provisions may be essential to the existence to the law itself does it become material to this consideration. If not fatal to the life of the act, such provisions fall, without destruction of the act itself, and their consideration and discussion would have no proper place upon this appeal. The title of the act has been quoted above. It is contended that this title masks, conceals, indeed, omits reference to the principal purpose of the act, which is the improvement of the river channels, and the throwing of the burden of the cost of such improvement upon the private landowner. It may be conceded that the title of the act contains no suggestion that in the promotion of drainage and reclamation of the lands

property owners to be taxed have no voice in the control of the company, the selection of its officers, or the imposition of the tax, creates a private corporation, although the object will be when accomplished, a public benefit, and as such is unconstitutional as granting a right of taxation to a private corporation. Harward v. St. Claire & Monroe Levee & Drainage Dist., 51 Ill. 130 (1869); George Hessler v. The Drainage Commissioners, 53 Ill. 105 (1870).

VIII. Quasi Corporations.

A drainage district is a voluntary *quasi* corporation, organized for a special and limited purpose. Its powers are restricted to such as the legislature has deemed essential for the accomplishment of such purpose, and it is only authorized to raise funds for the specific object for which it is formed, and can do that in no other mode than by special assessments upon the property benefited, which can in no case exceed the benefits to the lands assessed. Elmore v. Drainage Commissioners, 135 Ill. 269, 25 N. E. 1010, 125 Am. St. Rep. 363 (1890); Barton v. Minnie Creek Drainage Dist., 112 Ill. App. 640 (1903). Sels v. Greene, 81 Fed. 555 (1897).

Drainage districts, organized as they are, and clothed with the powers they exercise, created by general public laws

within the district the improvement of the river channels is contemplated; but the title is broad enough in its language to disclose that the general purpose of the act is to provide a scheme for the betterment of the lands lying within the described area. Such aspects of the rectification and improvement of the river channels as are set forth in the act, if falling within and germane to the general purpose announced by the title, did not require expression in that title. The two great purposes of the act, as above suggested, are, first, to bring into harmony under one general board of control the plans and work of existing districts and of the other lands not in them embraced. All this is quite independent of the matter of the improvement of the river channel. The second purpose is contingent upon the action of the state or federal government. It contemplates, still for the general purpose of the promotion of the reclamation of the lands, that it shall be determined what benefit those lands will receive, if any, when the government shall undertake this work. It was not the purpose of the constitutional provision here invoked to hamper legislation, but to check and prevent deceptive legislation (Cooley, Const. Lim. [6th Ed.] p. 175; Ex parte Liddell, 93 Cal. 638, 29 Pac. 251; Law v. San Francisco, 144 Cal. 388, 77 Pac. 1014; Beach v. Von Detten, 139 Cal. 462, 73 Pac. 187; People v. Linda Vista Irr. Dist., 128 Cal. 477, 61 Pac. 86), and we hold that the subject-matter of the benefits which might accrue to the land in the event of the rectification and deepening of the river channels was subordinate, germane to, and within the general purpose of the title, and did not call for express mention in that title.

The other considerations presented by appellant as showing that the body of the act contains a multiplicity of subjects foreign to its title may be disposed of collectively. From what has been said, it appears that the creation of the board of river control is not only within the purpose, but within the very title, of the act. The other objections go to the powers conferred upon the officers, and it may be seen that these powers are in legitimate aid of the general purpose of the act. If it should hereafter

for public purposes, are in no sense private corporations, but on the other hand they are at least *quasi* public corporations, and as such the laws providing for their organization are subject to be changed, modified or repealed, as the wisdom of the legislature may direct. Smith v. People ex rel. Detrick, 140 Ill. 355, 29 N. E. 676 (1892).

A drainage district is to be classified with counties, townships, school districts, road districts, and other *quasi* involuntary corporations, as distinguished from municipal corporations or private corporations. Such a district is a subdivision merely of the general powers of the state for the purposes of civil and governmental administration. Rood v. Claypool Drainage and Levee Dist., 120 Fed. 207 (1903).

An act of the legislature creating a drainage district, with commissioners who are to take oath, give bonds for the faithful performance of their duties,

be found that as to some specific matter excessive power had been conferred, it would be so decreed; but the decision would not tend to destroy the law as a whole. Upon the general subject-matter of the management and control over the existing districts, vested in the board of commissioners of the district here created, it may be suggested that it was within the unquestioned power of the legislature, with due regard to vested rights, to have put out of existence all of these districts, and, having done so, to have created a board of commissioners to manage future works of reclamation. That it has done less than this, by conferring upon such a board supervisoral control of these districts, while continuing their existence, is but an exercise by the legislature of less than its plenary power.

5. It is argued that the act in question works a taking of the landowner's property without due process of law. Herein it is insisted: (a) That the landowner was denied a hearing to which he was entitled upon the question of the inclusion or exclusion of his land; (b) that an illegal and unconstitutional tribunal was created to pass upon and determine the question of the benefits which his land, so improperly included, may receive, in violation of article 6, sections 1 and 5, of the Constitution.

(a) Where the legislature has itself spoken in the creation of a district such as this, and where the legislative determination may be deemed to depend upon a question of fact, it is conclusively presumed that the legislature took evidence in its determination, and the decision which it has reached will not be subject to review by the courts. The latter will confine themselves exclusively to questions appearing upon the face of the statute itself. Stevenson v. Colgan, 91 Cal. 649, 27 Pac. 1089, 14 L. R. A. 459, 25 Am. St. Rep. 230; Lewis v. Colgan, 115 Cal. 529, 47 Pac. 357; Smith v. Mathews (Cal.). Says Judge Cooley (Const. Lim. [6th Ed.] p. 220): "If evidence was required, it must be supposed that it was before the legislature when the act was passed, and if any special finding was required to warrant the passage of the particular act, it would seem that the passage of the act itself might be held equivalent to such finding." This court has said, commenting upon this language: "This view seems to be sustained by the decisions of the highest courts of other states and is in harmony with the central idea of the Constitution in prescribing the independence and equality of the three great

cause accurate surveys to be made of the route of the proposed system of drainage, and after hearing parties interested, to decide whether in their opinion the public health or welfare would be promoted by the intended work, and if so, to classify the lands for assessment of benefits and taxes, to collect the same, to make contracts, incur obligations, sue for and enforce the collection of delinquent assessments and exercise other corporate powers, is one

departments of the state." Stevenson v. Colgan, *supra*. Speaking directly upon this subject-matter, the Supreme Court of the United States has said (Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 174, 17 Sup. Ct. 56, 69, 41 L. Ed. 369): "It has been held in this court that the legislature has power to fix such a district for itself without any hearing as to benefits, for the purpose of assessing upon the lands within the district the cost of a local public improvement. The legislature, when it fixes the district itself, is supposed to have made proper inquiry, and to have finally and conclusively determined the fact of the benefits to the land included in the district, and the citizen has no constitutional right to any other or further hearing upon that question. The right which he thereafter has is to a hearing upon the question of what is termed the apportionment of the tax, i. e., the amount of the tax which he is to pay."

(b) Upon the amount of the tax which the landowner is to pay, the scheme by which that amount is to be apportioned and assessed has been outlined above. It will be remembered that, after disinterested persons have made their assessment, a notice of the time and place of the sitting of the board of drainage commissioners for the purpose of equalizing the assessment is to be given, the board is to hear complaints and correct errors, and its determination is declared to be final. It is insisted that this either creates a court or confers judicial powers upon executive and administrative officers, in violation of the constitutional provision of article 6, sections 1 and 5, of the Constitution. That the board sitting to equalize the assessments acts judicially must be conceded. The very purpose for which it sits is to act judicially for the correction of errors and abuses in the original assessment; but to say that for this reason the legislature has attempted to create a court in violation of the Constitution is a proposition to which assent must be denied. Many acts, judicial in their nature, must of necessity be performed by the executive and administrative officers of the government. The decisions of such officers upon any controverted question, upon any question even in which there is play for discretion, are in their nature judicial; but because this is so, and necessarily so, it does not follow that they are usurping the exclusive functions of the courts of the land, and, if they are not doing so, the power which they exercise may not thus be questioned. City councils and boards of supervisors annually fix the rates which water

clearly granting certain corporate powers and privileges. The act seems to constitute the drainage commissioners, a corporation to accomplish and carry out the work of the proposed system of drainage, but they are organized as *quasi* corporations for governmental purposes, in order to execute the police power of the state over a particular district for the promotion of the public health and welfare, and the act is not obnoxious to a provision of the Constitution prohibit-

consumers within their territories shall pay to the quasi-public corporations furnishing such water. Here these boards are called upon to consider and decide controverted questions of fact of great moment and of much nicety. Their decrees fixing rates contain many of the elements of a judgment. They are binding determinations upon the water company upon the one hand and upon the consumer upon the other. Yet, the power of these boards to exercise such quasi judicial functions has been upheld. Upon this very subject the Supreme Court of the United States, speaking through Chief Justice Waite, has said: "Like every other tribunal established by the legislature for such a purpose, their duties are judicial in their nature, and they are bound in morals and in law to exercise an honest judgment as to all matters submitted for their official determination. It is not to be presumed that they will act otherwise than according to this rule." Spring Valley Waterworks Co. v. Schottler, 110 U. S. 347, 4 Sup. Ct. 48, 28 L. Ed. 173. And, after quoting this language, that same court, speaking of the power of the board of supervisors under the irrigation district laws to pass upon the question of benefits, says: "In that case the board was to fix the price of water, while in this it is to determine the fact of benefits to lands. The principle is the same in each case." And, in this connection, it is declared that such a board, having the power to hear and determine the question of benefits, is a proper and sufficient tribunal to satisfy the constitutional requirements of due process of law. Fallbrook Irr. Dist. v. Bradley, 164 U. S. 169, 17 Sup. Ct. 67, 41 L. Ed. 369. And so in Hagar v. Rec. Dist., 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569, where the same subject is under discussion, it is said: "But where a tax is levied on property not specifically but according to its value, to be ascertained by assessors appointed for that purpose upon such evidence as they may obtain, a different principle comes in. The officers in estimating the value act judicially, and in most of the states provision is made for the correction of errors committed by them, through boards of revision and equalization, sitting at designated periods provided by law to hear complaints respecting the justice of the assessments. The law, in prescribing the time when such complaints will be heard, gives all the notice required, and the proceeding by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process

ing the legislature from enacting any special or private law granting corporate powers or privileges, except to cities. State ex rel. Baltzell v. Stewart, 74 Wis. 620, 43 N. W. 947 (1889).

As to power of legislature to dissolve district, see note IV to Chicago B. & Q. R. Co. v. Board of Supervisors of Appanoose County, *post*, p. 478.

Legislature may delegate power to districts, see note III, B, 4, to Chicago B. & Q. R. Co. v. Board of Supervisors of

of law." Against a fraudulent exercise of this power, recourse may, of course, be had to the courts. Irr. Dist. v. Tregea, 88 Cal. 334, 26 Pac. 237. But, otherwise, the requirement of due process of law is satisfied in the creation of this tribunal, with the powers conferred upon it to hear and correct errors and abuses, upon reasonable notice to the property owner.

6. The members of the board of drainage commissioners, as the board is constituted, are not disqualified by interest to act as a tribunal to hear objections to the assessment by reason of the fact that they are landowners within the district. Members of the boards of supervisors and of city councils, in adjusting water rates, are themselves consumers, and to that extent have an interest in the subject-matter of their decision; but they are not therefore disqualified. The principle is the same in this case. Hamilton, Special Assessments, 138; Hibben v. Smith, 191 U. S. 310, 24 Sup. Ct. 88, 48 L. Ed. 195.

7. Nor is there a double tax upon the land. The special assessment for benefits is upon the theory that, to the amount of such assessment, the land is directly benefited. Such general tax as the land may pay to the state stands upon an entirely different foundation. The owner of land fronting upon a street, who is assessed for special benefits for the street work, does not suffer double taxation when that land is assessed, and is again subject to general tax by the city or state, even though a portion of the money so derived should go to the maintenance of the highway in front of his property.

8. The act in terms does not attempt to impair the obligation of existing contracts. The state has the undoubted right to vary its plans for the reclamation of these lands, and in so doing to create new or different agents and mandatories. If in the operation of its new laws an attempt should be made to impair vested rights, the attempt, upon proper showing before a court, would unquestionably be held nugatory.

9. No violence is done by the act to the constitutional inhibition against requiring a property qualification for a voter. Const. art. 1, section 24. This objection is completely disposed of by People v. Rec. Dist. 551, 117 Cal. 114, 48 Pac. 1016. The assessments are for local improvements, not for general purposes of taxation, and the legislature permits the landowners to appoint their own agents. The method which it imposes upon the landowners in making the selection is wholly within its

Appanoose County, *post*, p. 475.

As to power to establish drain being statutory, see note VII to Seibert v. Lovell, *post*, p. 264.

As to what are swamps and overflowed lands see note I, to Hull v. Sangamon River Drainage District, *post*, p. 594.

control; for, as has been said, it is not compelled to give the landowners any voice in that selection.

We have thus discussed all the points advanced upon appeal and pertinent to this consideration under quo warranto. The questions presented arise upon the rulings of the court in striking out portions of the petition and in sustaining a general demurrer thereto.

For the reasons above given, the rulings complained of were correct, and the judgment appealed from is affirmed.

We concur: MELVIN, J.; SHAW, J.; ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.

The CHIEF JUSTICE, being a partner interested as a landowner within the boundaries of the Sacramento Drainage District, did not participate in the foregoing.

DUCKWORTH et al. v. WATSONVILLE WATER & LIGHT CO. et al.

[Supreme Court of California, August 25, 1910; rehearing denied, September 24, 1910.]

158 Cal. 206, 110 Pac. 927.

1. Pleading—Amendment—Error in Allowing Harmless.

The allowance of an amendment of an answer to a cross-complaint, denying specifically certain allegations, is, if erroneous, harmless where the original answer admitted the cross-complaint only so far as it was not inconsistent with the affirmative allegations of the answer.

2. Waters and Water Rights—Evidence—Expert Testimony as to Existence of Lake.

Opinion evidence as to whether a certain body of water was or was not a lake is inadmissible, the question being one which could be answered by any one properly informed regarding the definition of a lake and the facts and conditions surrounding the water, and therefore not a subject for expert testimony.

3. Same—Actual Appropriation Confers Right without Compliance with Code.

The actual appropriation of water without compliance with the code provisions is enough to give the appropriator a right as against any one who did not have, at the time of his diversion, a superior right.

4. Same—Cannot Devest Prior Rights.

Actual appropriation without compliance with the code provisions cannot devest prior rights, but will be good as against a subsequent appropriator.

5. Same—Compliance with Code—Rights Relate Back to Notice.

Compliance with the sections of the code relative to appropriation are important only in so far as the claimant seeks to have his rights relate back to the date of posting.

6. Same—Cuts Off Intervening Rights.

Compliance with code provisions will cut off rights accruing between the date of posting and the actual diversion for beneficial purposes.

7. Same—Actual Appropriation—Compliance with Code Not Necessary where no Intervening Rights.

Where no rights have intervened, actual appropriation may be made without following the provisions of the code.

8. Same—Failure to Follow Code Immaterial.

Where no claim of any right accruing between posting of notice and actual diversion and use of water is made, failure to follow the code provisions is immaterial.

9. Pleading and Practice—Findings upon All Issues.

Where it is alleged that certain water and riparian rights were conveyed to a certain party, and by that party to defendants, defendants are entitled to a finding upon such issues so as to have the right vested under such conveyance protected by the decree.

10. Waters and Water Rights—Effect of Conveyance of.

Effect of conveyance by landowner of all riparian and water rights and privileges except for domestic uses and irrigation, and for stock, is to convey all water and water rights and privileges of every kind, character, and description which apply or in any manner pertain to the land, except those reserved.

11. Same—Grantee of Vendor Estopped.

The grantee of one who has conveyed all his riparian and water rights to a third party is bound by such conveyance, and is estopped from asserting any rights in conflict with the rights so conveyed.

12. Same—Appropriation First in Time Is First in Right.

The law is thoroughly settled that as between two appropriators, the one first in time is first in right (per Shaw, J., concurring opinion).

13. Waters and Water Rights—Cannot Be Severed from Riparian Lands.

Riparian rights exist solely because land abuts on water, and extend to all water which may be reached from the land, and not to any specific, particular or definite quantity or area of it. Water cannot be severed from riparian land and transferred to a third person so as to give title and the right to remove it as against other riparian owners (per Shaw, J., concurring opinion).

14. Same—Conveyance of Water Rights—Estoppel of Vendor.

By conveyance of all his water rights, riparian owner is absolutely estopped to use any part of water on land except as reserved in the conveyance.

Action involving the rights of the parties to the waters of a certain lake. Decree confirming certain rights to each of the parties. Reversed.

For appellants—Chas. Shurtleff and H. C. Wyckoff.

For respondents—Netherton & Torchiana.

SLOSS, J. The first trial of this action, which involves the rights of the parties to the waters of Pinto Lake, in Santa Cruz County, resulted in a judgment declaring that the plaintiffs had a prior right to take as much water as they could beneficially use upon their land, not exceeding a continuous flow of 250 miners' inches. Upon an appeal to this court, the judgment was reversed, for reasons stated in an opinion reported in 150 Cal. 520, 89 Pac. 338. The facts giving rise to the controversy and the relative situations of the parties and their property are set forth in that opinion, and need not be restated here. Upon a second trial, the superior court gave judgment declaring that the Watson-

CASE NOTE.

Rights of Appropriator of Water Not Complying with the Statute as against One Subsequently Complying Therewith.

The object of statutes requiring the giving of notice by posting, recording, etc., of intention to appropriate waters, is to give information of such intention to persons subsequently intending to appropriate the same waters, and to fix a time at which the rights of the appropriator giving such notice shall commence, provided he diligently prosecutes the work of diversion and within a reasonable time puts the water diverted to a reasonable use. When this is done, the rights relate back to the time of the giving of notice. The giving of such notice, however, is not essential to an appropriation of waters; by an actual appropriation and diversion the same object is even better accomplished and the giving of notice and taking of the other steps provided by the statute can have no effect upon the rights of one who prior thereto had made actual

ville Water & Light Company has the right, as riparian owner, to divert and apply on its land riparian to said lake ten miners' inches of water; that it has the right, by virtue of appropriation, to divert forty miners' inches for a beneficial purpose or use; and that, subject to these rights of the said water and light company, the plaintiff S. J. Duckworth has the right to divert 142 miners' inches of water from Pinto Lake for beneficial purposes. Each of the said parties is enjoined from interfering with the rights of the other as above defined. The defendants now appeal from this judgment and from an order denying their motion for a new trial.

A preliminary question should be disposed of before proceeding to a consideration of the merits. In its cross-complaint, the Watsonville Water & Light Company alleged that it was the owner and entitled to the exclusive use of all the waters contained and flowing in Pinto Lake. The plaintiff answered this allegation in a form that was declared by this court, on the former appeal, to be to a certain extent evasive. The appellants now complain of the action of the court below in making an *ex parte* order, after the reversal of the first judgment by this court, permitting the plaintiffs to amend their answer to the cross-complaint by denying specifically the aforesaid allegation. It is unnecessary to consider whether this order was erroneous. The amendment made no material change in the issues. Under the original answer, the allegation that the cross-complainant owned all the water of the lake was, as is pointed out in the former opinion, admitted only in so far as such allegation was not "inconsistent with the affirmative allegations of the answer." See 150 Cal. 530, 89 Pac. 343. One of these allegations was that plaintiff S. J. Duckworth "has a right to and an interest in said waters * * * as an appropriator." He claims here only as such appropriator, and the order permitting him to amend was, therefore, if error, harmless.

appropriation and use of the water, although he took none of the steps prescribed by the statute. Duckworth v. Watsonville Water & Light Co., principal case; De Necochea v. Curtis, 80 Cal. 397, 20 Pac. 563, 22 Pac. 198 (1889); Burrows v. Burrows, 82 Cal. 564, 23 Pac. 146 (1890); Alta L. & W. Co. v. Hancock, 85 Cal. 219, 24 Pac. 645, 20 Am. St. Rep. 217 (1890); Wells v. Mantes, 99 Cal. 583, 34 Pac. 324 (1893); Watterson v. Saldunbehere, 101 Cal. 107, 35 Pac. 432 (1894); Senior v. Anderson, 115 Cal. 496, 47 Pac. 454 (1896); Duckworth v. Watsonville Water & Light Co., 150 Cal. 520, 89 Pac. 338 (1907); Murray v. Tingley, 20 Mont. 260, 50 Pac. 723 (1897).

The actual diversion and use of water without a compliance with the statute gives a right to the continued use thereof as against one whose right of purchase of the land vests after diversion is fully completed. De Necochea v. Curtis, 80 Cal. 397, 20 Pac. 563, 22 Pac. 198 (1889).

One who diverts water upon public unoccupied lands of the United States

The appellants attack the sufficiency of the evidence to sustain a finding "that Pinto Lake, its tributaries and outlet, is part of a running stream." This finding followed the verdict of an advisory jury to which certain special issues had been submitted. A similar finding had been made at the first trial. Upon the former appeal we said, in answer to an objection like the one now made, that we could not "agree with the appellant in his contention that the finding that the lake, or its tributaries, constituted a running stream, is not sustained by the evidence." The showing in support of the finding contained in the present record is quite as strong as that before this court on the earlier appeal. Without giving to the view heretofore expressed by us binding force as the "law of the case" (see Allen v. Bryant, 155 Cal. 256, 100 Pac. 704, and cases cited), we are, after reconsideration, satisfied with that view, and shall apply it to the present appeal.

In disposing of this point, it may be well to advert to the alleged error of the trial court in declining to permit appellants' witnesses to state whether, in their opinions, "Pinto Lake is a lake." We think that the objection that the question called for expert testimony on a matter not properly the subject of expert testimony was well taken. The facts and conditions observed by the witnesses had been fully described. Whether the subject of their observation and testimony constituted a water course or a body of standing water was a question which could be answered by any one who was properly informed regarding the definitions of the respective terms. The distinction between a stream and a lake was, presumably, correctly declared to the jury as matter of law. The ultimate question whether or not there was a running stream was to be answered by the jury, acting under proper instructions or by the court itself.

The court found that the Watsonville Water & Light Company is the riparian owner of a strip of land bordering the lake; that five and

from its natural course, and conveys it through ditches and flumes to a distant point and uses it for irrigation, mining or manufacturing purposes, has a perfect right to the water actually appropriated as against all the world except the owner of the soil and those claiming adversely who have complied with the law, and this whether the diversion was made before or after the taking effect of the code provisions regarding notice, etc. De Necochea v. Curtis, 80 Cal. 397, 20 Pac. 563, 22 Pac. 198 (1889).

The actual diversion and use of water without the giving of notice confers a right thereto as against pre-emptioner of public lands. De Necochea v. Curtis, 80 Cal. 397, 20 Pac. 563, 22 Pac. 198 (1889); Burrows v. Burrows, 82 Cal. 564, 23 Pac. 46 (1890). A statutory appropriation is not necessary to acquirement of the right. Alta L. & W. Co. v. Hancock, 85 Cal. 219, 25 Pac. 645, 20 Am. St. Rep. 217 (1890).

The posting of notice and proceedings thereunder, as required by the statute, will give no right to the use

one-half acres of said land is capable of cultivation; and that not more than ten inches of water could be used for the irrigation of this land. It found, further, that since 1901 the said company has diverted forty inches of water from Pinto Lake, and that this water has been sold by the company and applied to lands nonriparian to Pinto Lake. The plaintiff S. J. Duckworth has succeeded to the interest of his wife, Flora McKinley Duckworth, who was originally joined with him as plaintiff. It is found that prior to the commencement of the action, said S. J. Duckworth posted on the bank of the lake a notice of appropriation, giving notice that he proposed to appropriate 250 inches of water from said lake. The recording of the notice and the commencement and prosecution of the necessary work are found. There is a finding that plaintiff has actually appropriated and diverted from the lake 142 inches of water, and applied it to the beneficial purpose of irrigating a portion of his land, and that this diversion has not materially increased the cost to the water and light company of taking water from the lake.

If these findings stood alone, and if all of them were sustained by the evidence, the judgment establishing the rights of the parties as hereinabove stated would appear to be free from objection. The appellants question the sufficiency of the evidence to support some of these findings. It is claimed, in the first place, that there is no evidence that the plaintiff's notice of appropriation was ever recorded. This claim appears to be well founded. An examination of the bill of exceptions fails to disclose any showing on this point. A further attack on the sufficiency of plaintiff's appropriation is that the notice designated a six-inch pipe as the means of diversion, whereas the diversion was in fact made through a twelve-inch pipe. On the former appeal the question whether the use of a larger conduit than the one specified would vitiate a notice

of water as against one who has theretofore actually diverted and appropriated it to a beneficial use. Wells v. Mantes, 99 Cal. 583, 34 Pac. 324 (1893).

The law is now settled that where there has been an actual appropriation of water, a right to it is acquired without following the course laid down in the code. Watterson v. Saldunbehere, 101 Cal. 109, 35 Pac. 432 (1894).

Giving of notice is not essential to a valid appropriation of water, which may be by actual diversion for some beneficial use. Senior v. Anderson, 115 Cal. 496, 47 Pac. 454 (1896).

Where one has completed the diversion of water before any rights in the land are acquired by another, the appropriation will hold good as against the latter. Taylor v. Abbott, 103 Cal. 421, 423, 37 Pac. 408 (1894).

The appropriation of water under the California Civil Code has only the effect of giving the appropriator a right superior to that of any subsequent appropriator on the same stream, and he acquires thereby no rights whatever as against rights existing in the water at the time his appropriation was begun. Duckworth v. Watsonville

of appropriation was expressly left open for the reason that it was not presented by the record. We do not think a decision of this question is required by the state of the case as it now appears. Let us assume that no rights can be founded on the notice, whether for want of recording or for failure to state correctly the size of the pipe through which water was to be diverted. Civ. Code, § 1415. The plaintiff did, however, actually divert and apply to a beneficial use 142 inches of water, as is found by the court on sufficient evidence. Such actual appropriation, without compliance with the code provisions, is enough to give him a right as against any one who did not have, at the time of the diversion, a superior right. It cannot devest prior rights, but it will be good as against a subsequent appropriator. Wells v. Mantes, 99 Cal. 583, 34 Pac. 324; Watterson v. Saldunbehere, 101 Cal. 107, 35 Pac. 432. Compliance with the sections of the code relative to appropriation are important only in so far as the claimant seeks to have his right relate back to the date of posting. Civ. Code, § 1418. Such compliance will cut off rights accruing between the date of posting and the actual diversion for beneficial purposes. If no such rights have intervened, the actual appropriation may be made without following the provisions of the code. De Necochea v. Curtis, 80 Cal. 397, 20 Pac. 563, 22 Pac. 198; Burrows v. Burrows, 82 Cal. 564, 23 Pac. 146; Wells v. Mantes, *supra*. In the case at bar the prior rights of the water company as riparian owner and senior appropriator, so far as it was found to have such rights, were fully recognized and preserved by the decree. The company claimed no right accruing between the posting of the notice and the actual diversion and use by Duckworth. The failure to follow the code provisions is therefore immaterial.

The appellant water company claims, however, that under its prior appropriation it was entitled not only to the forty inches of water which it had actually diverted and applied to beneficial uses, but to a further

Water & Light Co., 150 Cal. 520, 89 Pac. 338 (1907); Duckworth v. Watsonville Water & Light Co., principal case.

Where an actual appropriation and diversion of the water take place prior to the posting of notice, the posting of the notice and the other steps under the statute are immaterial. The right vested upon the actual diversion and beneficial use of the water. Brown v. Newell, 12 Idaho 166, 85 Pac. 385 (1906).

A valid water right may be acquired even where there has been no compliance with the statutes, where water has been actually diverted from a stream by means of a ditch, and applied to a beneficial use in the absence of the inception of any adverse statutory claim. Murray v. Tingley, 20 Mont. 260, 50 Pac. 723 (1897).

Where an appropriation is made by an actual diversion and use and thereafter a statutory notice is filed but nothing further is done under it, the rights of the appropriator are fixed by his actual appropriation and he gains no new rights by the notice. Smyth v. Neal, 31 Or. 105, 49 Pac. 850 (1897).

quantity as a reserve or emergency supply for the city of Watsonville, to be drawn on in case of accident to the pipe line from which said city is usually supplied. By an amendment to the answer the defendants alleged that the water company had connected the pipe leading from the lake with a reservoir connecting with its system of pipes supplying the city of Watsonville for the purpose of appropriating the waters of the lake for the furnishing a reserve for such emergency uses. We do not see that this fact in and of itself could give the company a right to anything in excess of the forty inches. The only diversion alleged was one of forty inches through a fifteen-inch pipe, and the water taken through such pipe was applied, as the answer states, to two beneficial purposes, i. e., the irrigation of lands and a reserve or emergency supply. But the total amount claimed to have been diverted for both purposes was forty inches, and the company's prior right to take this amount is recognized by the decree.

The appellant water company claims further that it had, by virtue of certain deeds, rights which were prior and superior to any right of Duckworth to use the waters of Pinto Lake on his land except for domestic purposes and the watering of stock. The answer avers that in 1885, while Carmen Amesti de McKinley was the owner of the land now owned by plaintiff, and upon which he is applying the water claimed by him as appropriator, she conveyed to the defendants Smith and Montague, all and singular the water and riparian rights and water rights and privileges of every kind, character, and description, which belong or in any manner pertain to said land, save and except the necessary water for domestic and culinary purposes and the watering of stock. The court made a finding in support of this allegation. There is, however, no finding upon the further averment of the answer that in January, 1897, Smith and Montague conveyed to the Watsonville Water & Light Company all the rights so conveyed to them by Mrs. McKinley. The defendant corporation was entitled to a finding on this issue, and if the finding was in its favor, to have

Assuming that no rights can be vested by notice of appropriation for want of record, or for failure to state correctly size of pipe through which water is to be diverted, where the appropriator does actually divert and apply to a beneficial use a certain amount of water, such actual appropriation, without compliance with the statute, is enough to give him a right as against any one who did not have at the time of the actual diversion, a superior right. It cannot devest prior rights, but it will be good as against a subsequent proprietor. Duckworth v. Watsonville Water & Light Co., principal case.

Compliance with the statute relative to appropriation is important only in so far as the claimant seeks to have his right relate back to the date of posting. Such compliance will cut off rights accruing between the date of posting and the actual diversion for beneficial purposes. If any such rights have not inter-

the rights vested in it under said deed protected by the decree. The plaintiff claims title as successor in interest to Mrs. McKinley, and as owner of the land is bound by her deed to the same extent that she was. The purpose and effect of the conveyance was to transfer to the grantees whatever right the grantor had to apply the waters of Pinto Lake to the land of the grantor, except for domestic uses and irrigation of stock. The instrument conveys not only riparian right, but all water and water rights and privileges of every kind, character, and description which belong or in any manner pertain to said land. The right, or one of the rights, now asserted by Duckworth, is to apply the waters of Pinto Lake to the irrigation of the same land. This is a right which has been transferred by his predecessor in interest to the defendant, and he is, by virtue of her deed, estopped from asserting it in antagonism to her grantees. It is of no consequence that he bases his claim upon a so-called "appropriation," made subsequent to the deed. An appropriation under our statute, has only the effect of giving the appropriator "a right superior to that of any subsequent appropriator on the same stream. But he acquires thereby no right whatever as against rights existing in the water at the time his appropriation was begun. An appropriation does not of itself deprive any private person of his rights; it merely vests in the appropriator such rights as have not previously become vested in private ownership. * * *" Duckworth v. Watsonville Water & Light Co., 150 Cal. 520, 531, 89 Pac. 338, 343. But if Duckworth, in applying waters for the benefit of his lands, were to be given priority over the use of the same waters by the Watsonville Water & Light Company, his appropriation would have the effect of taking away from said company a part of the very right which had been transferred by plaintiff's predecessor, so far as she was capable of transferring it. That grant was, of course, not effective to convey any right not owned by the grantor or owned by third parties. It was however, effective as an estoppel on the grantor and her successors, preventing them from objecting to any use by the water company of water which might, in the absence of the deed,

vened, the actual appropriation may be made without following the provisions of the statute. Duckworth v. Watsonville Water & Light Co., principal case.

More definite information for his guidance is furnished a party contemplating the appropriation of water by an actual diversion thereof than could be obtained from any notices provided by statute. Wells v. Mantes, 99 Cal. 583, 34 Pac. 324 (1893).

Where appropriator claims no right accruing between posting of notice and actual diversion and use of water, failure to follow the statutory provisions as to appropriation is immaterial. Duckworth v. Watsonville Water & Light Co., principal case.

The simple act of appropriation under the statute will not of itself defeat or extinguish any prior right. Alta L. & W. Co. v. Hancock, 85 Cal. 219, 24 Pac. 645, 20 Am. St. Rep. 217 (1890).

The appropriation does not of itself

have been applied for the benefit of the McKinley land. That it operated as such estoppel so far as plaintiff's riparian right is concerned was expressly held on the former appeal, where we said that, because of said deeds, "the water company can use the water for any purpose, at any place, and in any quantity which leaves plaintiffs enough for stock and domestic purposes." It is true that in the same opinion we said that "Duckworth claims a right to a part of the water by appropriation, and with respect to the right thus claimed he has a status which entitles him to challenge the right of the water company. His privity with the McKinley deed does not estop him from making an appropriation of any water in the lake that may be subject to appropriation, nor from demanding that the water company shall not make a greater use of the water than it is authorized to do by the rights which it is shown to have, if such use interferes with an appropriative right by him." But in this passage we were speaking of the general right to appropriate water for use upon land other than that owned by the grantor of the deeds. It was intended to declare merely that the making of the deeds did not prevent the maker or her successors from appropriating water. Whether Duckworth had any right as appropriator was not decided, nor was it decided that he could, notwitstanding the grant of all water and water rights belonging or pertaining to certain land, make an appropriation for use upon that very land, which should be good as against the grantees or their successors. For the reasons above stated, we think it must be held that he could not appropriate for that purpose. The right which he claims is the right to take water and use it upon his land. That right has been conveyed to the defendant, and the plaintiff cannot, in the face of his predecessor's deed, be permitted to revive it, or retake it by the mere device of entitling his taking an "appropriation."

If upon another trial, it should be found that the rights conveyed to Smith and Montague are now vested in the water company, the latter is entitled to a decree declaring that it has a right superior to any claim of plaintiff to use water on the land mentioned in the deeds to take water from the lake in any quantity and for any purpose, provided enough is left for domestic purposes and stock on plaintiff's land. This right extends not only to the water actually heretofore taken by the water company, but to all which it may hereafter divert and apply to beneficial use.

deprive any private person of his rights. It merely vests in the appropriator such rights as have not previously become vested in private ownership. Duckworth v. Watsonville Water & Light Co., 150 Cal. 520, 89 Pac. 338 (1907); Duckworth v. Watsonville Water & Light Co., principal case.

Before the adoption of the civil code in California, all that was necessary was the actual appropriation and use of water for the intended purpose, and no

As a new trial will be necessary, we express no opinion upon the sufficiency of the evidence to support the finding that the cost to the water company of taking water has not materially increased since the diversion of 142 inches of water by plaintiff. The issue will have to be tried again, and the evidence relating to it may differ from that now before us.

It may perhaps be unnecessary to add that the foregoing discussion has reference simply to the rights of the parties *inter se*. The right of third parties to take a part of the water of the lake, or to complain of a diversion by any of the parties to this action, is not here involved, and cannot be affected by anything here decided.

Under the views herein expressed, the further points made by appellants do not, we think, require attention.

The judgment and order denying a new trial are reversed.

We concur: ANGELLOTTI, J.; LORIGAN, J.

SHAW, J. I concur. There appears to have been some misapprehension by counsel concerning the passage in the opinion upon the former appeal in this case relating to the status of Duckworth as an appropriator or user of water not taken under any claim of riparian rights. Having written that opinion, I take this occasion to state more fully what I conceive to be the true doctrine on that point.

Duckworth was not at the time of the first trial the owner of the McKinley lands, but held a lease thereon. The notices of appropriation posted by him stated that he proposed to use the water upon other lands as well as upon that land. This reference to other lands may have been insufficient, under the code, as a designation of the place of intended use, and for that reason his notice of appropriation may have been void as to use on such other lands, or *in toto,* as a proceeding under the statute; but it was sufficient to show that he was claiming a right to divert water for use on lands other than the McKinley lands, which might ripen into a right by prescription, and as to these other lands he would not be estopped by the McKinley deeds to Smith and Montague. Now if Duckworth was at the time actually diverting water from the lake and using it on such other lands, not riparian, and the defendant company was also diverting water therefrom for use on nonriparian land, which,

posting or record of notice was required. De Necochea v. Curtis, 80 Cal. 397, 20 Pac. 563, 22 Pac. 198 (1889).

As against one subsequently acquiring title from the government, an actual diversion and use of the water is limited to the extent and manner of such actual and completed diversion. De Necochea v. Curtis, 80 Cal. 397, 20 Pac. 563, 22 Pac. 198 (1889).

As to appropriation and diversion of waters of springs, see note to Hollett v. Davis, *post*, p. 415.

for the purposes of the discussion to which the passage from the former opinion was devoted, might have been the case as between them, in such a case the law is thoroughly settled that the one first in time is first in right. With respect to these possible antagonistic claims, therefore, Duckworth had the right to show, if he could, that his diversion and use on such other lands antedated that of the defendant, or any recent enlargement of its use by the defendant. We were then considering not the actual case, but the case as it might possibly develop under the pleadings, and it was this claim of right which was referred to in the former opinion in the expression "with respect to the right thus claimed he has a status which entitles him to challenge the right of the water company." We did not say that he was entitled to prevail over the water company, but that he was in a position, with regard to or by virtue of the pleadings, to attack or to challenge the alleged right of the defendant, a position which made their alleged rights as users of water on nonriparian lands a material issue in the case as presented in the pleadings. It seems from the record before the court on the present appeal, that he does not now claim the right to use the water except on the McKinley lands. This being the case, all that was said on this subject on the previous appeal is inapplicable to the present case.

Perhaps something more should be said regarding the effect of a conveyance by the owner of riparian land, of his riparian right therein, to another for nonriparian use. The court below seems to have been of the opinion that the riparian right consisted of the ownership of a definite quantity of the water of the lake, a quantity equal only to the amount which could be beneficially used on the riparian land concerned, and that the conveyance merely transferred to the grantees that quantity from the lake, leaving the riparian grantor free to take thereafter an equal or greater quantity therefrom and use it on the identical land, provided only that he must leave enough to furnish to the grantees the definite quantity which, by this theory, was conveyed, or if the grantees were using less, then enough to provide for their actual use from time to time. This was not the legal effect of the conveyance. The riparian right exists solely because the land abuts upon the water. It is parcel of the land. It extends to all the water which may be reached from the land, and not to any specific particles or definite quantity or area of it. It is the right to make reasonable use and consumption of the water on the adjoining land and to a reasonable use of the water in place, in

As to transporting appropriated water through dry ravines, etc., see note to Lower Tulle River Ditch Co. v. Angiola Water Co., *post*, p. 280.

As to the formation of and various matters relating to irrigation districts, see note to Pioneer Irrigation Dist. v. Oregon Short Line, *ante*, p. 2.

connection with and for the benefit of the land. The water cannot be severed from the land and transferred to a third person so as to give him the title and right to remove it, as against other riparian owners. The grantor alone will be estopped by such a conveyance. The estoppel against him with respect to the use and consumption of the water, or diversion from its natural position, must be as complete and extensive as was the right he conveyed. The McKinley deeds conveyed the entire right to use this water for irrigation on these lands to the defendant's predecessors, and it now belongs to the defendant, and not to Duckworth. A man may not eat his cake and have it. A man who sells a right to do a thing cannot thereafter exercise the right himself, except by permission of the buyer, and it is immaterial that the buyer may not be using or exercising it. If the water company had obtained similar deeds from the owners of all the lands abutting upon the lake and its tributaries, it would have obtained a complete estoppel against such landowners, which would have prevented them from interfering with any use it saw fit to make of the water, and such estoppel would undoubtedly extend to all the water of the lake. If, having this right of estoppel, it chose to use only a part of the water, or none of it, this neglect to use it would not give any of the owners the right to take that which the company suffered to remain unused. A judgment which purported to give such owners the unqualified right to use the water on their respective tracts as against the company, would operate to deprive the company of the property which it had bought and paid for and to return that property to the person who sold it and received payment of the price. The same principle must apply when the estoppel has been obtained as to one only of the riparian owners. He is absolutely estopped to use any part of the water on the land, except as specified in the deed by which he is bound. These propositions are fully established by the following authorities: Alhambra, etc., Co. v. Mayberry, 88 Cal. 74, 25 Pac. 1101; Gould v. Stafford, 91 Cal. 155, 27 Pac. 543; Gould v. Eaton, 117 Cal. 542, 49 Pac. 577, 38 L. R. A. 181; Yocco v. Conroy, 104 Cal. 471, 38 Pac. 107; Lux v. Haggin, 69 Cal. 300, 310, 392, 4 Pac. 919, 10 Pac. 674; St. Helena W. Co. v. Forbes, 62 Cal. 184, 45 Am. Rep. 659; Zimmler v. San Luis W. Co., 57 Cal. 222; Farnham on Waters, §§ 462, 463; Gould on Waters, §§ 207, 215.

DUCKWORTH et al. v. WATSONVILLE WATER & LIGHT CO. et al.

[Supreme Court of California, February 8, 1907; rehearing denied, March 9, 1907.]

150 Cal. 520, 89 Pac. 338.

1. Riparian Owner—Right in Source Lakes.

A lower riparian owner along an intermittent stream has no right in water standing in pools or lakes above his land; his right is limited to the water naturally passing his land for use on his land and he cannot transfer a greater right to one owning land on souree lake.

2. Same—Extent of Right.

A riparian owner of the greater part of a lake shore and bed has no right in the water by virtue of such ownership except for actual beneficial use on the riparian land.

3. Same—Purchaser of Right.

One purchasing the rights of a riparian owner in a lake need not enter upon such owner's land in order to exercise the right but may take the water from any point in the lake.

4. Irrigation—Right by Prescription.

The adverse user of water for the purpose of watering stock gives no right to use for irrigation or other purposes.

5. Appropriation—Running Stream.

Evidence of the intermittent overflow of a lake together with a slight flow into the lake in dry season is sufficient to support a finding that the lake with its tributaries and outlet constitutes a running stream subject to appropriation.

6. Same—Former Grant—Estoppel.

A riparian owner under a former holder who had granted the riparian rights to another is not estopped from making an appropriation nor from enforcing his rights as appropriator against the grantee of the riparian rights, subject to the terms of the prior grant.

7. Same—Prior Rights.

The right to appropriate water exists wherever water exists unappropriated and free from superior claims, and an appropriation and use becomes effective against a private right only after five years' adverse user, and then only to the extent of the use.

8. Water Rights—Pleading—Negative Pregnant.

An answer denying that a water company is the owner entitled to the exclusive use of all the waters of a lake is an admission that the water company is entitled to substantially all of the water.

9. Same—Notice.

A notice of appropriation which states that the water is to be used on certain described land and upon other land not described, to be conveyed in "a six-inch pipe or by a pipe of other dimensions" is sufficient to authorize use on the land described through a six-inch pipe.

10. Acknowledgment—Certificate.

A certificate of aeknowledgment is sufficient which begins "State of California, Monterey County—ss" and recites that "before me, John Ruurds, notary public in and for Monterey County," etc., and is signed by him, with the words "notary public" following.

Action to determine water rights by S. J. Duckworth and another against the Watsonville Water & Light Company and others. Judgment for plaintiffs. Defendants appeal. Reversed.

For appellants—C. A. Shurtliff and H. C. Wyckoff.

For respondents—Dickman & Torchiana and W. P. Netherton.

SHAW, J. Plaintiffs are the owners of 320 acres of land fronting on Pinto Lake; the plaintiff Flora being the owner of the fee, and the other plaintiff the owner of a leasehold interest. They claim rights in the waters of the lake as riparian proprietors thereon, and the plaintiff S. J. Duckworth also claims a right by appropriation to take therefrom a quantity of water equal to a continuous flow of 250 miners' inches under a four-inch pressure. The lake contains an area of about 70 acres. The defendant Watsonville Water & Light Company owns 65 acres of the bed and surface of the lake and all the land surrounding it, except the land of plaintiffs and two other tracts of small extent, and claims the ownership of, and the right to take and use, all the waters of the lake. The purpose of the action, as stated in the complaint, is to have the plaintiffs' alleged rights determined. The corporation defendant filed a cross-complaint, alleging ownership of all the water of the lake, and asking that its right be also determined. Judgment was given declaring that the plaintiffs have the right to take from the lake and use upon their land as much water as they could beneficially use thereon, not exceeding a continuous flow of 250 miners' inches, and enjoining the defendants from interfering with the plaintiffs' right to such use, and that the defendant corporation take nothing by its cross-complaint. The defendants appealed from the judgment within 60 days after its rendition, and present the evidence in the record by a bill of exceptions.

The plaintiffs derive their title to the land from Carmen Amesti de McKinlay, who, on May 13, 1901, leased the land to S. J. Duckworth, and on August 6, 1901, conveyed it to the plaintiff Flora McKinlay Duckworth, subject to the lease. In 1885, while Carmen Amesti de McKinlay was the owner in fee of the land, she made conveyances to the defendants Smith and Montague, whereby she granted to them "all and singular the water and riparian and water rights and privileges of every kind, character and description which belong, or in any manner pertain to," the 320 acres of land, the same being particularly described therein, reserving, however, the right to water for domestic use and watering stock thereon. On January 21, 1897, Smith and Montague conveyed to the Watsonville Water & Light Company all the waters, right, and privileges conveyed to them by Carmen Amesti de McKinlay as aforesaid.

Smith and Montague thereupon, so far as appears, ceased to have any interest in the property in controversy. They joined in the answer and join also in the appeal. There are some indications in the evidence that their holding prior to 1897 was for the benefit of the water company. In any event, as they have no present interest, their position in the case need not be further discussed. It is claimed that the evidence does not sustain the findings. As to several of them, we think this contention is well founded.

1. There was an outlet to Pinto Lake, through which water usually flowed from the lake during the rainy season of each year, but which was dry at all other times. One Grimmer owned a tract of land which abutted upon this outlet at a point some distance below the lake. On March 21, 1903, Grimmer conveyed to S. J. Duckworth "all riparian rights and other water rights and water" which he possessed in this outlet as appurtenant or belonging to this tract of land. This conveyance was made after the beginning of the action, but before the filing of the cross-complaint, and in his answer to the cross-complaint Duckworth averred that by virtue thereof he was a riparian owner to the waters of the lake. The court found, in accordance with this answer, that the plaintiff S. J. Duckworth "is a riparian owner of the waters of said Pinto Lake, its tributaries and outlet," by virtue of this deed. Even if we consider the lake with its tributaries and outlet as forming one continuous stream of water, as the lower court found it to be, this finding is not technically true. Every owner of land upon a stream is, in some respects, interested in the entire stream. He has the right to use the water as it passes his land for domestic purposes thereon, and to take out a reasonable portion thereof for the irrigation of his abutting land, and for the protection of this right, which begins only when the water reaches his land. He has a certain right with regard to all the waters of the stream above his land—the right to insist that it shall not be polluted to his injury nor diminished from use by other riparian owners above, so as to deprive him of his just portion, and, perhaps, as to other than riparian owners, the right to prevent any substantial diminution of the amount of water which would naturally flow to his land. If nothing more than this was meant by the finding in question, we could not say that it was not supported by some evidence, nor that it was not a correct general statement of the right of Duckworth under the Grimmer deed. But the finding is that Duckworth thereby became a "riparian owner" of the waters of the lake, and it appears that, under it, he claims some right as against the defendant water company, to take water from the lake for use, not on the Grimmer land, but on the Duckworth land, which abuts on the lake far from the outlet, and that not only during

the rainy season, or at such times as there is water flowing to the Grimmer land, but during all seasons, and when the outlet is entirely dry. The court below seems to have intended this finding to declare some such right. This claim is contrary to the doctrine of riparian rights, and to the general principles of law as well. Neither a riparian proprietor nor an appropriator has title or ownership in the water of the stream before it reaches his land, or point of diversion, respectively. This has been expressly decided with respect to appropriators. Parks M. Co. v. Hoyt, 57 Cal. 46; Riverside W. Co. v. Gage, 89 Cal. 418, 26 Pac. 889; McGuire v. Brown, 106 Cal. 670, 39 Pac. 1060, 30 L. R. A. 384. The same rule applies to the riparian owner. As a riparian owner, Grimmer had no title to the water, except as it passed in front of his land and constituted the stream. The right or title to the stream as it passed was a part and parcel of his land, a part of the realty. See cases last cited. Being a part of his realty on his land, it was also part of the realty of other riparian owners at the points where it passed over their lands. Hence the title of each to the water exists only during such passage, and the right of each in the water during its course above consists only of the right to use such means as are necessary to preserve it until it reaches his land. Grimmer had the right to use a reasonable portion of the water running in the outlet by his land for the irrigation of his land riparian thereto, and to take the whole of it, if necessary, for domestic purposes. This right exists because the stream runs by the land, and thus gives the natural advantage resulting from the relative situation. When the stream ceased, and the channel became dry, he, for the time being, ceased to be a riparian owner, so far as a present use of the water was concerned. His land did not, at those times, border upon any stream. It did not then possess any natural right to the use of the water standing in pools or lakes at points above his land. During such dry periods, he could obtain the use of water from such pools or lakes only by convention with the owners of the lands abutting upon them. He would not have it by virtue of any right pertaining to his own land. Furthermore, his riparian right is limited to his riparian land. It gave no right to use any of the water of the stream for any purpose, upon land not riparian, nor upon any riparian land other than his own. No one can sell or convey to another that which he does not himself own. Grimmer could not, by a transfer of his riparian rights, sell to the plaintiff, as against third persons having interests in the water, the right to use the water upon any land, riparian or nonriparian, except his own, to which it originally attached. His deed operated to prevent him from complaining of a diversion, but it did not affect other parties. It does not appear that Grimmer had any water rights except his right as riparian owner to the use of the water of the outlet. It follows, therefore, that

Duckworth did not obtain anything by the Grimmer deed except the right to use the water of the outlet on the Grimmer land, when any water was flowing therein, and an estoppel against Grimmer to prevent complaint by him against any use of such water which Duckworth might make to the injury of the Grimmer riparian right, as above defined. It did not in any respect add to his rights to take water from the lake for use on the Duckworth land, as against the defendants, or as against any one except Grimmer and his successors in interest.

2. The findings further state that the water company has never exercised or used any of the water rights derived from the deeds from Carmen Amesti de McKinlay to Smith and Montague. This is true in the literal sense that it has not used any water upon the land to which these rights, prior to those deeds, attached. But it appears from the evidence that the water company was pumping water from the lake during the eight years extending from December, 1894, to December, 1902. The amount is not shown, but it was enough, during part of the time, at least, according to the testimony of William A. White, its superintendent, to furnish water to several strawberry growers for irrigation of their plants, and so much that, if the plaintiffs took the 250 inches they claim, the two diversions would not leave much water in the lake at the end of the dry season. This evidence is not as definite as it should have been; but, there being no evidence to the contrary, it established the fact that the company had taken a substantial quantity of water from the lake during the time specified. Such taking would have been contrary to the riparian rights attached to the Duckworth land, if they had remained unsevered therefrom. By reason of its purchase of these riparian rights, the company possessed the right, so far as that land and its owners were concerned, to use the whole, or any part, of the waters of the lake except such as were necessary for domestic use and for the watering of stock thereon. The pumping of the water was done in the exercise of this right, and it was a right obtained by virtue of the McKinlay deeds. This finding is therefore contrary to the evidence.

3. There is a finding to the effect that, after the execution of the deeds by Carmen Amesti de McKinlay to Smith and Montague, in 1895, she continued in possession of the water and water rights thereby granted to them, and that she and the plaintiffs, as her successors, did not relinquish possession thereof to the grantees, but have ever since then remained in possession thereof, and that they had been in the open, notorious, hostile, and adverse possession thereof for more than five years immediately before the commencement of this action. This finding has no support in the evidence. They did, indeed, remain in possession of the land, and continued to exercise all ordinary acts of ownership over it, including the use of the water of the lake for the watering of stock.

This latter use of the water, however, was reserved in the deed, and hence it was not one of the rights granted. Even if it had been granted, the adverse use for the watering of stock alone could gain a right only to the extent of the use, and it would not confer any right to the additional use of water for the irrigation of land. There is no evidence that Mrs. McKinlay, or either of the plaintiffs, ever made any use of the water other than for the watering of stock, or claimed the right to do so as against the defendants, until November, 1902, a few months before this action was begun. The finding seems to have been based on the fact that the defendants never entered upon the land of the plaintiffs for the purpose of exercising or asserting the right to use the waters of the lake which they obtained under the McKinlay deeds. But it was not requisite to the exercise of the rights granted by the deeds that they should enter upon the land, unless it became necessary to do so in order to get the water from the lake. The deed was evidently procured to protect the grantees from interference in their proposed diversion of water from the lake. They could get the water from any other point on the lake as well as from the limits of the McKinlay land, and it appears that they took it form the lower end of the lake. This was a taking from the McKinlay land, as well as from all the other land on the borders of the lake. The force of gravity would accomplish that. The use which was made of the land by the plaintiffs and McKinlay was not antagonistic to the right the defendants had to the water, under the grant. It is not true, therefore, that the grantor and her predecessors continued or remained in possession of the rights of the grantee, nor that said rights were not relinquished to the grantees, nor that the possession of the plaintiffs and their predecessor extended to the water rights granted, or was hostile and adverse to the grantee, or open and notorious with respect thereto. According to the evidence, their actual use of the water, if any, did not begin under their adverse claim, until the day of the trial in the lower court.

4. There is some evidence that Pinto Lake, with its tributaries and outlet, during the rainy season, constituted a running stream of water. It is clear that during the dry seasons there was no water flowing out of the lake, but there is evidence that during that period there was a slight flow from a tributary into the lake. We cannot agree with the appellant in his contention that the finding that the lake, or its tributaries, constituted a running stream is not sustained by the evidence. We think the better doctrine, in respect to the character of a stream from which the statute provides for appropriations, is that it is not necessary that the stream should continue to flow to the sea, or to a junction with some other stream. It is sufficient if there is a flowing stream; and the fact that it ends either in a swamp, in a sandy wash in which the water disappears, or in a lake

in which it is accumulated upon the surface of the ground, will not defeat the right to make the statutory appropriation therefrom, and we can see no reason why the appropriation, in such a case, may not be made from the lake in which the stream terminates, and which therefore constitutes a part of it, as well as from any other part of the water course.

5. The only use which the water company makes of the water is to take it to nonriparian lands to be used thereon for irrigation. Respondents claim that the only right of the water company to the water, shown in the case, consists of the riparian rights pertaining to the narrow strip of land belonging to the water company surrounding the greater part of the lake, and the riparian rights under the McKinlay deeds, and that the use made of it is not in the exercise of either of these rights, but is inconsistent with each of them. In regard to this claim it is to be observed that, so far as the use made of the water by the water company may affect the rights claimed by the Duckworths as riparian owners of the McKinlay land, they have no ground of complaint, being estopped by the McKinlay deeds, and not having regained the rights by adverse possession. The estoppel does not extend to the water necessary for domestic use and for stock, but their right to that extent is not in dispute, nor have they been deprived of it by the water company. But S. J. Duckworth claims a right to a part of the water by appropriation, and with respect to the right thus claimed he has a status which entitles him to challenge the right of the water company. His privity with the McKinlay deed does not estop him from making an appropriation of any water in the lake that may be subject to appropriation, nor from demanding that the water company shall not make a greater use of the water than it is authorized to do by the rights which it is shown to have, if such use interferes with an appropriative right possessed by him. But the claim that the water company has not established any other right is not maintainable. Its cross-complaint alleges that it is, and for a long time has been, "the owner and entitled to the exclusive use of all the waters" of Pinto Lake. The plaintiffs, in their answer thereto, deny that the water company is, or has been, "the owner and entitled to the exclusive use of all the waters" of the lake. That is not a good traverse of the allegation. It is an admission that the water company is entitled to substantially all of the water. Fitch v. Bunch, 30 Cal. 208; Blood v. Light, 31 Cal. 115; Fish v. Redington, 31 Cal. 185; Reed v. Calderwood, 32 Cal. 109; Doll v. Good, 38 Cal. 287. This allegation of the cross-complaint, therefore, stands as an admitted fact of the case, except so far as it is inconsistent with the affirmative allegations of the answer thereto and of the original complaint. The effect, for the purposes of the trial, was to establish the fact that the water company owns and has the exclusive right to use, for any purpose and at any place, all of the water of the lake, excepting such portion thereof, or right thereto, as is

alleged and was proven to belong to the plaintiffs or either of them. Inasmuch as the evidence did not show, and the court did not find, that the alleged claims of plaintiffs included all the waters of the lake, the judgment that the defendants take nothing is contrary to the evidence and to this admission of the pleadings. The existing rights of other riparian owners, not parties to this suit, are not material to this case.

6. The right to appropriate water, under the provisions of the Civil Code, is not confined to streams running over public lands of the United States. It exists wherever the appropriator can find water of a stream which has not been appropriated, and in which no other person has or claims superior rights and interests. And the right cannot be disputed except by one who has or claims a superior right or interest, and by him only so far as there is a conflict. It cannot be vicariously contested by another on behalf of the owner of the better right. The effect of an appropriation under the statute, when completed, is that the appropriator thereby acquires a right superior to that of any subsequent appropriator on the same stream; but he acquires thereby no right whatever as against rights existing in the water at the time his appropriation was begun. An appropriation does not, of itself, deprive any private person of his rights. It merely vests in the appropriator such rights as have not previously become vested in private ownership either by virtue of some riparian right, or because of prior statutory or common-law appropriation and use. It affects and devests the riparian rights otherwise attaching to public lands of the United States, solely because the act of Congress declares that grants of public lands shall be made subject to all water rights that may have previously accrued to any person other than the grantee. An appropriation of water and use thereunder does not become effective to devest private rights in the stream, unless it has been continued adversely thereto for the period of five years, under such circumstances as to gain a title by prescription, and then only to the extent of the use. The amount claimed in the notice is no measure of the right.

It follows that the attempted appropriation by S. J. Duckworth of a part of the water of the lake did not devest or affect the existing rights of the water company either as riparian owners or by virtue of a prior appropriation or use. And so far as his claim was adverse to, and in conflict with, the prior rights and interests of the water company, it was entitled to a decree quieting its title against him and enjoining him from asserting such adverse title. This applies to the riparian right which attached to its strip of land partially surrounding the lake as well as to any other prior right which it possessed to the water. The fact that the company had not used the water on this narrow strip did not affect the riparian right. A riparian right is neither gained by use, nor lost by disuse, and, for the protection of these riparian rights, the water company is entitled

to a judgment declaring Duckworth's appropriation subject to the riparian rights pertaining to its lands and subject to all other prior rights of the water company, so that the continued use of the water by Duckworth shall not be adverse, and shall not ripen into an easement, which, in effect, would devest the rights of the water company. Moore v. Clear L. W. Co., 68 Cal. 146, 8 Pac. 816; Stanford v. Felt, 71 Cal. 249, 16 Pac. 900; Heilbron v. Fowler S. C. Co., 75 Cal. 426, 17 Pac. 535, 7 Am. St. Rep. 183; Conkling v. Pacific I. Co., 87 Cal. 296, 25 Pac. 399; Walker v. Emerson, 89 Cal. 456, 26 Pac. 968; Spargur v. Heard, 90 Cal. 221, 27 Pac. 198; Anaheim U. W. Co. v. Fuller (decided 1907), 88 Pac. 978.

7. We have said that, because of the McKinlay deeds, and so far as the claim of plaintiffs as riparian owners is concerned, the water company can use the water for any purpose, at any place, and in any quantity which leaves plaintiffs enough for stock and domestic purposes; but the mere fact that the company is a riparian owner on the lake gives it no right whatever to the water of the lake, except for actual beneficial use upon the land to which the riparian rights attach. The evidence does not show that it is using the water on that land at all. It is carrying the water to other lands and places, for use and sale. The admission of the pleadings, above referred to, relieves it of the necessity of establishing its right to do this, except as it may be affected by evidence in support of the specific rights alleged by the plaintiffs; but the right it actually exercises is not a right derived from the fact of its riparian ownership of the greater part of the lake shore and bed.

8. The claim of the respondents that the grant by Mrs. McKinlay of the rights pertaining to the land described in the deeds extended only to the water then standing in the lake, and that as soon as that water was exhausted by use, run-off, or evaporation, the rights ceased to exist, is utterly baseless, and needs no discussion, further than to deny it.

9. In its conclusions of law, the court declared that the defendants are estopped from claiming any rights under the McKinlay deeds. We find nothing in the evidence justifying this conclusion. The plaintiffs did not make an adverse claim until November, 1902, and the water company, about the same time, served on them written notice of its claim to the water under the said deed. This may not have been necessary, but it undoubtedly prevented any estoppel from arising in their favor by reason of any subsequent expenditure of money by them in the diversion of water in pursuance of their adverse claim, granting that such expenditure would otherwise have created an estoppel.

10. We have said that the water company is entitled to a judgment protecting its riparian right, although it has not used, and does not immediately propose to use, the water on its riparian land. This rule does not apply to any right which it has acquired by appropriation or use

upon other lands, and this appears to be the source of the right which it has been exercising. Such right depends upon use, and ceases with disuse. Civ. Code, § 1411. It extends only to the water actually taken and used. The consequence is that, so far as the protection of this right, and the water necessary to supply this use, are concerned, the water company is not entitled to prevent an appropriation or use by others of the surplus of the waters of the lake, if there is any. So long as there is enough to supply it with the quantity of water which it has been so using, it has, in the protection of this right, no concern with the disposition of the remainder. It has the right, of course, to insist upon a reasonably ample quantity to last through the entire season, until rains renew the supply, and also to enjoin a depletion of the lake which will lower the water surface so as to substantially increase the cost of making the diversion it is entitled to make.

11. It may be that, upon another trial, the sufficiency of the notice of appropriation posted by S. J. Duckworth may not be important; but, as this cannot be decided here, it is necessary to notice the objections urged against it. The notice states that the water claimed therein is to be used for irrigation upon the land owned by Mrs. Duckworth, describing it. This is a sufficient statement of the purpose for which the water was claimed and the place of intended use, and it is not vitiated by the additional statement in the notice that it was also to be used for irrigation by other parties to whom Duckworth might furnish it upon other land, which was not described. It was a good notice for the appropriation of water for use on the place designated, at all events. It states that the water is to be conveyed to the place of use "by a six-inch pipe, or by a pipe of other dimensions." This we consider sufficient to authorize a diversion of the quantity that could be carried in a six-inch pipe, and not exceeding the 250 miners' inches claimed as the maximum. Whether or not it would justify a diversion, within the amount limited, if carried in a pipe more than six inches in diameter, is a question not presented, inasmuch as it does not appear that such pipe was proposed to be used.

12. It is claimed by the respondents that they acquired their title from Mrs. McKinlay to the land in question by purchase for a valuable consideration, and without actual notice of the deeds to Smith and Montague, and that the record of those deeds is ineffectual to constitute constructive notice to them, because the acknowledgment of each deed is defective. The acknowledgments were made before a notary public. The certificates recite his name and official character in the usual form. They are signed by him, with the addition of the words "Notary Public" after his signature. The Code requires that the officer certifying to an acknowledgment must affix thereto his signature, followed by the name of his office.

Civ. Code, § 1193. The objection is that the words "notary public" are not a sufficient statement of the name of the office. The certificates in question begin thus: "State of California, Monterey County—ss."—and each recites that "before me, John Ruurds, notary public in and for said Monterey County, personally appeared," etc. In view of this statement, we think the name of the office is sufficiently stated after the signature. There is nothing in Emeric v. Alvarado, 90 Cal. 479, 27 Pac. 356, that is in conflict with this conclusion. In that case the body of the certificate stated that the officer was a notary public of the city and county of San Francisco, while the name of the office after the signature was given as "Notary Public, Contra Costa County." The officer was in fact a notary public of Contra Costa County, and the acknowledgment was taken in that county, though the contrary was stated in the certificate. It was held that the certificate was invalid because it did not, in the body of it, truly recite the "name and quality of the officer" or the venue, as the law required, and that the words, "Notary Public, Contra Costa County," following the signature, were not sufficient to make it good. The two statements were inconsistent, and the certificate afforded no means of ascertaining which was correct. Here there is no inconsistency, and the statement after the signature, construed according to the ordinary usage of the language, and in connection with the recital, means that the person signing was a notary public of Monterey County. This is the proper construction, and therefore it does correctly state the name of the office, as the Code prescribed.

In conclusion, we deem it proper to say that, upon another trial, if the court shall decide that either of the parties possess rights to the water, acquired by appropriation under the statute, or by diversion and use, it will be necessary to ascertain and declare the amount of water covered by the right owned by each respectively. It is not necessary to mention the other points discussed in the briefs.

The judgment is reversed, and a new trial ordered.

We concur: ANGELLOTTI, J.; SLOSS, J.; McFARLAND, J.; HENSHAW, J.; LORIGAN, J.

HALL v. HOOD RIVER IRRIGATION DISTRICT.

[Supreme Court of Oregon, August 4, 1910.]

— Or. ——, 110 Pac. 405.

1. **Waters and Water Courses—Irrigation Districts—Power to Issue Second Series of Bonds.**

Under section 4714 of the Code, as amended in 1909, irrigation district has power to issue additional bonds after having exhausted the funds received from a sale of bonds prior to amendment.

2. **Municipal Corporations—Issuance of Bonds by Must Be Authorized by Statute.**

Municipalities cannot issue bonds unless authority to do so is expressly given or clearly implied.

Action to enjoin the sale of bonds issued by irrigation company under provisions of B. & C. Comp., § 4714, as amended by Gen. Laws, 1909, p. 364. Judgment for defendant upon sustaining of demurrer. Affirmed.

This is a suit by Charles Hall to enjoin the sale of a second bond issue of $75,000 issued by the Hood River Irrigation Company. The complaint alleges:

"(1) That ever since the month of May, in the year 1905, the said defendant was and is now an irrigation district, duly organized and existing and doing business under and by virtue of the provisions of chapter 5 of title 39 of Bellinger & Cotton's Annotated Codes and Statutes of Oregon, and the amendments thereto. That said irrigation district is situated wholly within Hood River County, in the State of Oregon.

"(2) That plaintiff at and during all the times herein mentioned was, and is now, the owner and holder of title to the following described real property situated in said district, to wit: Beginning at a point 780.3 feet south from the northwest corner of the N. W. ¼ of section 17, township 2 N., range 10 E. of the Willamette meridian, said point of beginning being on section line in township 2 N., range 10 E.; thence east 2,795.2 feet, south 471 feet, west 2,795.2 feet, to section line between sections 17 and 18; thence north 471 feet, to place of beginning, containing thirty acres of land more or less.

"(3) That said defendant heretofore, between the month of August, in the year 1905, and the month of October, in the year 1906, for the purpose of constructing necessary irrigating canals and works and

acquiring necessary property and rights therefor, and for the purpose of carrying out the provisions of its organization duly and regularly, under and by virtue of the provisions of sections 4714, 4715, and 4716 of Bellinger & Cotton's Codes and Statutes of Oregon, duly and regularly issued and sold the bonds of said irrigation district to the amount of $100,000, and that said sum of $100,000 was expended by said defendant in constructing necessary irrigating canals and works and acquiring necessary property and rights therefor, and for the purpose of carrying out the provisions of said chapter 5 of said Bellinger & Cotton's Codes and Statutes of the State of Oregon. That said fund of $100,000 has been wholly exhausted by said expenditure, and the same was insufficient for the completion of the plans and works adopted.

"(4) That on August 9, 1909, the said defendant by and through its board of directors by resolution entered on its record, formulated a general plan of its proposed works in constructing its ditches and canals in which said general plan the said board stated in a general way what works and property it proposed to purchase and acquire, and what works it proposed to construct, and the estimated cost for carrying out said plans, and how it proposed to raise the necessary funds therefor, to-wit, by a bond issue and sale of the same. That for the purpose of ascertaining the estimated cost and value of such works said board caused surveys, examinations, and plans to be made to demonstrate the practicability of such plan, and to furnish the proper basis for an estimate of the cost of carrying out the same. That said surveys, examinations, maps, plans, and estimates were made under the direction of a competent irrigation engineer and certified to by him.

"(5) That thereafter said board submitted a copy of said surveys, examinations, maps, plans, and estimates to the state engineer, and within ninety days thereafter the said state engineer made and filed a report upon the same with said board, which said report contained such matters as in the judgment of the state engineer were reasonably necessary. That the report of the state engineer was received by said board in the month of January, in the year 1910, and the said report of the state engineer was approved and accepted by said board, and said board on the

As to bonds of drainage districts, see note to Sisson v. Board of Supervisors of Buena Vista Co., p. —, vol. 3, this series.

As to issuance of bonds by irrigation districts in general, see parts III and IV, note to Pioneer Irrigation Dist. v. Oregon Short Line, pp. 43, 51, vol. 1, this series.

As to the issuance of bonds by drainage districts and various questions of the procedure therefor, legality thereof, etc., see note to Sisson v. Board of Supervisors of Buena Vista Co., p. ——, vol. 3, this series.

As to constitutionality and legality of bond issues by irrigation districts and attacks thereon, see part III, note to

1st day of February, in the year 1910, proceeded to determine the amount of money necessary to be raised at $70,000, and determined upon a bond issue to the amount of $70,000. And it was determined on February 1, 1910, by said board, for the best interests of said district to call a special election on the 26th day of February, in the year 1910, at Barrett school house in said irrigation district, to submit to the electors of said district the question of whether or not the bonds of said district in the sum of $70,000 should be issued for the purpose of building ditches and flumes, and the carrying out of necessary work and the payment of necessary costs and expenses to supply water to the landowners of said district for irrigating purposes.

"(6) That the following notice of said election was posted in three public places in each election precinct in said district for twenty days prior to February 26, 1910, and the same was also published in the Hood River Glacier, a newspaper published in Hood River County, Or., where the office of the board of directors of said district is kept, once a week for at least three successive weeks prior to said election: 'Notice of Special Bond Election, Hood River Irrigation District, February 26, 1910. Notice is hereby given, pursuant to order of the board of directors of the Hood River Irrigation District, that a special bond election will be held at the Barrett school house in said district, Hood River County, Oregon, on Saturday, the 26th day of February, 1910, at which time there will be submitted to the qualified electors of said district the question of issuing the bonds of the district in a sum not exceeding $70,000 (seventy thousand dollars) for the purpose of building ditches, flumes, and the carrying out of necessary work, and the payment of necessary costs and expenses to supply water to the landowners of said district for irrigation purposes. The polls will be opened one hour after sunrise of said day and will close at sunset of said day. Dated and first posted February 2, 1910, by order of the board of directors of the Hood River Irrigation District. R. W. Kelly, Secretary, Hood River Irrigation District.'

"(7) That said election was held as by law required, and that at said election there were a total of forty-eight (48) votes cast, forty-six (46) of which were 'bonds yes' and two (2) of which said votes were 'bonds no,' so that there were forty-six (46) votes in favor of bonds and two (2) votes against bonds.

Pioneer Irrigation Dist. v. Oregon Short Line, p. 43, vol. 1, this series.

As to irrigation districts in general, their formation, powers, duties, liabilities, etc., see note to Pioneer Irrigation Dist. v. Short Line, p. 2, vol. 1, this series.

As to irrigation districts being public municipal corporations, see part I, par. H, note to Pioneer Irrigation Dist. v. Oregon Short Line, p. 14, vol. 1, this series.

"(8) That on the 28th day of February, in the year 1910, the said board of directors met for the purpose of canvassing the returns of said election, and said board found that said election was duly and regularly had and held, and that there were a total of forty-eight votes cast at the election, forty-six for bonds and two against bonds, and the result of said election was declared and entered of record.

"(9) That all the matters above set forth were declared of record by said board in its minutes.

"(10) That said board are now proceeding to and threaten to, and will, unless restrained by this honorable court, sell the bonds of said district under and by virtue of the authority attempted to be vested in them by said election of February 26, 1910.

"(11) That said bond issue is null and void, as said district possesses no authority by law or statute to issue or sell said bonds for the reason that it having already sold its first bond issue above mentioned, and having exhausted the proceeds of the same, there is no statute authorizing any further bond issue or sale.

"(12) That plaintiff has no speedy, adequate or sufficient relief at law, and unless the court interfere and enjoin the said defendants from selling said bonds, the said plaintiff will be greatly and irreparably damaged, and the said bond issue and said bonds will be a cloud upon plaintiff's title to said real property.

"Wherefore plaintiff prays for a decree of court annulling and canceling said bond issue, and plaintiff further prays that during the pendency of this suit the said irrigation district, its officers and agents, be enjoined and restrained from selling said bonds and from taking any further proceedings in the matter of the sale and issuance of said bonds, and plaintiff prays for such other and further relief as to the court may seem just and equitable."

To this complaint a demurrer was interposed on the grounds that it did not state facts sufficient to constitute a cause of suit; and from a judgment sustaining the demurrer and dismissing the suit plaintiff appeals.

For appellant—A. J. Derby.

For respondent—Bennett & Sinnott.

KING, J. (after stating the facts). The sole question presented by this appeal is whether, under B. & C. Comp., § 4714, as amended by chapter 219 of the General Laws of 1909, defendant is authorized after having exhausted the funds received from a sale of bonds issued under the section prior to the amendment, to make and sell an additional bond

issue. The plaintiff insists that this right is excluded by the amendment, while counsel for defendant maintains that this authority is clearly implied in the law as amended. Section 4714 of the Code, prior to amendment, so far as it bears upon this question, provided: "For the purpose of constructing necessary irrigating canals and works, and acquiring the necessary property and rights therefor, and otherwise carrying out the provisions of this act, the board of directors of any such district must, as soon after such district has been organized as may be practicable, and whenever thereafter the construction fund has been exhausted by expenditures herein authorized therefrom, and the board deem it necessary or expedient to raise additional money for said purposes, estimate and determine the amount of money necessary to be raised, and shall immediately thereafter call a special election, at which shall be submitted to the electors of such district possessing the qualifications prescribed by this act, the question whether or not the bonds of said district in the amount as determined shall be issued. * * *" The section as amended reads: "For the purpose of procuring necessary reclamation works, and acquring the necessary property and rights therefor *and otherwise carrying out the provisions of this act,* the board of directors of any such district shall, as soon as practicable after the organization of such district, by a resolution entered on its record, formulate a general plan of its proposed (works) in which it shall state in a general way what works or property it proposes to purchase or acquire, *and what work it proposes to construct,* and the estimated cost of carrying out said plan, and how it proposes to raise the necessary funds therefor. * * *" After specifying the manner in which the bonds shall be issued, etc., the amended section continues: "In case the money raised by the sale of all the bonds be insufficient for the completion of the plans and works adopted, *and additional bonds be not voted,* it shall be the duty of the board to provide for the completion of said plan by levy of assessments therefor, in the manner herein provided."

It is settled law that municipalities cannot issue bonds unless the authority to do so is expressly given or clearly implied. 28 Cyc. 1575. Taking into consideration the italicized expressions in the above excerpts, "and otherwise carrying out the provisions of this act," "what work it proposes to construct," "additional bonds," etc., we think it manifest that the defendant has brought itself within this rule. More especially does it appear that this authority is implied when the phrases quoted, together with the general object to be obtained by the entire act, is examined in connection with a further statement in the amended section, to the effect that, after the first bond issue provided "for the purpose of procuring necessary reclamation works * * * and otherwise

carrying out the provisions of this act * * *" shall have been authorized at an election there specified, the board "thereafter" may "whenever * * * in its judgment" it is deemed "for the best interest of the district that the question of the issuance of bonds in said amount, or any amount, shall be submitted to said electors, it shall so declare of record in its minutes, and may thereupon submit such questions to said electors in the same manner and with like effect as at such previous election." To hold otherwise would, for obvious reasons, in many instances defeat the very purpose for which the law was enacted. We are of the opinion that the issue complained of is authorized by the act as amended.

The judgment is affirmed.

GRAY v. NEW MEXICO PUMICE STONE CO.

[Supreme Court of New Mexico, August 16, 1910.]

— N. M. —, 110 Pac. 603.

1. Mining Claim—Mechanics' Liens—Statement of Lien.

Under Sec. 2221 of the Compiled Laws of 1897, providing that every person claiming a mechanic's lien must file for record with the county recorder of the county in which the property is situated a claim containing a statement of his demands, etc., with a statement of the terms, time given, and conditions of his contract, it is sufficient as against a demurrer to state that claimant agreed with the owner of the property to work for it for the sum of three dollars a day and board.

2. Same—Statement of Character of Labor.

Statement in the claim of lien that it is for labor performed by the lien claimant in the construction of the mining claim on the land, is sufficient.

3. Same—Original Contractor.

Every person who deals directly with the owner of the property and who in pursuance of a contract with him performs labor or furnishes material, is an original contractor within the meaning of the statute.

4. Same—Pleading—Demurrer.

A separate demurrer by a subsequent incumbrancer directly raises the question whether the complaint and claim of lien states facts sufficient to constitute a cause of action against the defendant demurring.

5. Same—Constitutional Law—Attorneys' Fees.

The statute allowing attorneys' fees upon foreclosure of mechanic's lien is constitutional.

CASE NOTE.

Services for Which Mechanics' Liens Are Allowed on Mining Claims.

6. Same—Character of Labor.

Labor in working in a quarry as a laborer, working as foreman with other laborers, directing them in their work, working at lime-kiln, gathering up tools, closing lime bins, and caring for team of horses, is all within the statute allowing mechanic's lien.

7. Same—"Mining Claim," Meaning of Term.

The words "mining claim" in the mining country have a certain well-understood meaning, viz., a portion of the public mineral lands of the United States to which qualified persons may first obtain the right of occupancy and possession by means of location and secondly may obtain title by pursuing certain prescribed methods therefor.

Action to foreclose mechanic's lien. Decree for plaintiff. Affirmed.

For appellant—Herbert F. Raynolds.

For appellee—Felix H. Lester.

PARKER, J. 1. Objection is made to the claim of lien on the ground that it fails to state the terms, time given, and condition of the contract under which the labor was performed, as is required by section 2221 of the Compiled Laws of 1897, which is as follows: "Every original contractor, within ninety days after the completion of his contract, and every person, save the original contractor, claiming the benefit of the act, must within sixty days after the completion of any building,

I. In General.

The original idea underlying mechanic's lien statutes was that where the person contributed his labor or materials to the construction of a building or improvement the owner ought in equity and good conscience be made to pay for the increased value of the property by reason of the labor or materials of the lien claimant; but in mining it cannot be said that the labor of a man adds to the value of the mine. On the other hand it necessarily, except in strictly prospecting and development work, detracts from the value of the mine by removing therefrom its ores which, when exhausted, leaves the mine valueless. It may well be argued, therefore, that the statutes extending liens to laborers on mining claims were intended to include all laborers of every class and kind who may be employed in and about the mining operations thereon. Gray v. New Mexico Pumice Stone Co., principal case.

Where the specific relation which the labor of a lien claimant must bear to the property is pointed out in a statute, no other labor furnishes the basis of a claim of lien, but where the statute is general in terms and provides for a lien of any person who performs labor upon or in a mining claim, labor of any class bearing a direct relation to the mining operations is sufficient to form a basis for a claim of lien. Gray v. New Mexico Pumice Stone Co., principal case.

II. Law Not Retroactive,

The law giving a miner a lien for his labor is not retroactive, and therefore no lien attaches to the property for labor performed prior to the passage of the law. Hunter v. Savage Consol. Silver Min. Co., 4 Nev. 153, 9 Mor. Min. R. 357 (1868).

III. As Superintendent or Manager.

The superintendent of a mine who does manual labor therein is entitled to

improvement, or structure, or after the completion of the alteration or repair thereof, or the performance of any labor in a mining claim, file for record with the county recorder of the county in which such property or some part thereof is situated, a claim containing a statement of his demands, after deducting all just credit and offset, with the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed, or to whom he furnished the materials, with a statement of the terms, time given, and conditions of his contract, and also a description of the property to be charged with the lien, sufficient for identification, which claim must be verified by the oath of himself or some other person." The terms of the claim of lien are as follows: "Claimant agreed to and with the New Mexico Pumice Stone & Lithograph Company to work for said company for the sum of $3 per day and board." This is certainly a very meager statement, but can it be said that it is so insufficient as to invalidate the lien? If the terms and

a mechanic's lien the same as any other laborer. Palmer v. Uncas Mining Co., 70 Cal. 614, 11 Pac. 666 (1886).

The services of a superintendent in planning and superintending development work upon a mine, and in planning and supervising the erection of a mill and machinery, are the subject of a lien. Rara Avis Gold & S. Min. Co. v. Bouscher, 9 Colo. 385, 12 Pac. 433 (1886).

One employed as the superintendent of a mining company, having general supervision and charge of the mines and works, and employed at a monthly salary, contributes only in an indirect manner to the improvement of the property, and is not entitled to a mechanic's lien. He stands very much in the situation of an owner directing and managing works of his own. He is the representative of the corporation, and to the laborers under him he is the corporation at the place where the labor is performed. Smallhouse v. Kentucky & Montana Gold & S. Min Co., 2 Mont. 443, 9 Mor. Min. R. 388 (1876).

Under New Mexico Compiled Laws, sec. 1520, providing for a lien in favor of one who performs labor in any mining claim, a general manager and superintendent who does no manual labor is not entitled to a lien. Boyle v. Mountain Key Min. Co., 9 N. M. 237, 50 Pac. 347 (1897).

Under the Oregon statute "every person who shall perform labor upon * * * any mine, lode, mining claim * * * shall have a lien," etc. A superintendent and general manager of a mine cannot be held to be a person performing labor upon the mine within the meaning and intent of the statute. The phrase "every person who shall perform labor" is used to designate ordinary laborers who perform actual physical toil, common laborers and those who are required to use their hands or muscles in actual work, and does not include that higher and usually better-paid class of employees whose duties are confined to superintendence and management, unless such class is expressly mentioned in the statute. Durkheimer v. Copperopolis Copper Co. (Or.), 104 Pac. 895 (1909).

Under section 1221 of the Compiled Laws of Utah, providing that any "person or persons who shall perform any work or labor upon any mine * * * shall be entitled to a miner's lien for the payment thereof," etc., one employed as a superintendent to direct the work in

conditions of the contract, as stated, were the only terms and conditions agreed upon, none others could be stated. If no time was given, then no statement could be made on the subject. There is nothing in this record to show that there were in fact any other terms or conditions in the contract of employment than those expressed. Under such circumstances, the claim of lien is clearly not open to attack by demurrer. We therefore hold that the claim of lien is sufficient on its face in this particular.

2. The lien claim is challenged on the ground that it fails to show the character of the labor for which it is asserted. This requirement in so far as it exists arises out of the provision of the statute heretofore quoted, to the effect that the claim of lien shall contain "A statement of his demands." In some jurisdictions, as for instance in Washington, this provision has been quite strictly construed, and it is there held that it must appear what the labor or materials were for which the claim

the mine, with authority to employ and discharge miners and procure and purchase supplies for working the mine, and whose duty it was to plan, oversee, and direct the work of the mine, direct the shipping of ore and generally control and direct the actual working and development of the mine, comes within the letter and spirit of the law, and is as much entitled to a lien for his services as any other laborer. Cullins v. The Flagstaff Silver Min. Co., 2 Utah 219, 9 Mor. Min. R. 412 (1877), affirmed 104 U. S. 176, 26 L. Ed. 704 (1880).

Street-car tickets and meals of superintendent under contract for erecting and fitting out an amusement park were held to be not subject to mechanic's lien. Hass Electric & Mfg. Co. v. Springfield Amusement Park Co., 236 Ill. 452, 86 N. E. 248, 127 Am. St. Rep. 297 (1908).

IV. As Geologist and Expert.

Under the statute providing for mechanics' liens on property in favor of architects, engineers, and artisans rendering professional services thereon, a geologist and mining expert who explored and examined certain mines and the surrounding country under contract with the owner, is not entitled to a mechanic's lien for his services. Lindemann v. Belden Consol. Min. & Mill. Co., 16 Colo. App. 342, 65 Pac. 403 (1901).

V. As Amalgamator.

Where a person performs labor in a quartz mill located upon and belonging to a mine under employment by the owners, and such labor consists in working "as an amalgamator, attending to putting silver into batteries, dressing plates, keeping the machinery in running order, looking after the concentrates, adjusting them, and putting them in shape to run, cleaning amalgam, looking after the rock-breaker, and generally looking after the entire machinery," he is entitled to a lien on the mine for such labor under the Lien Laws of Idaho. Thompson v. Wiseboy Min. & Mill. Co., 9 Idaho 363, 74 Pac. 958 (1903).

VI. As Bookkeeper, Cashier or Clerk.

The keeping of books and the disbursement of funds, while matters of great importance, are not subject of mechanics' liens. Rara Avis Gold & S. Min Co. v. Bouscher, 9 Colo. 385, 12 Pac. 433 (1886).

Shipping clerk on wharf where coal is shipped held entitled to a lien for his

is asserted. See Warren v. Quade, 3 Wash. St. 750, 29 Pac. 827. In other jurisdictions it is held, more properly as we believe, that a statement of the general nature of the materials furnished, or labor performed, together with the amount claimed to be due therefor, after deducting all just credits and offsets, is all that is required. Jewell v. McKay, 82 Cal. 150, 23 Pac. 139; McClain v. Hutton, 131 Cal. 133, 61 Pac. 273, 63 Pac. 182, 622; Maynard v. Ivey, 21 Nev. 241, 29 Pac. 1090. In the case under consideration the specific character of the labor performed by the lien claimant is not stated further than to say that it was labor performed in the construction of the mining claim on the land. This seems to be sufficiently definite and may include many different kinds of labor, for all of which a claimant would be entitled to a lien.

3. Objection is made to the claim of lien upon the ground that it was not filed for record in time. The objection is based upon the proposition that the lien claimant is not an original contractor within the mean-

services. Appeal of Farmers' Bank of Schuylkill Co., 1 Walk. (Pa.) 33 (1862).

VII. As Foreman.

The foreman of a mine is entitled to a mechanic's lien where he assists in the general work of the mine, such as the framing of timbers, the erection of a mill, helping the men generally, as well as seeing that the work of mining is properly done. Washburn v. Inter Mountain Min. Co. (Or.), 109 Pac. 382 (1910).

Under the statute providing that every person performing labor upon or furnishing materials to be used in the construction, alteration or repair of any mining claim, etc., has a lien upon the same for the work or labor done or materials furnished, one employed during part of the time as a foreman and part of the time as a watchman is not entitled to a lien, such services not being of the character contemplated by the law. Idaho Min. & Mill. Co. v. Davis, 123 Fed. 396, 59 C. C. A. 200 (1903).

One whose duties are to act as general foreman, to "boss" the men who are at work in the mine, keep their time, and give them orders for their pay, is entitled to a mechanic's lien. Capron v. Strout, 11 Nev. 304 (1878).

VIII. As Watchman or Caretaker.

The services of a watchman in caring for a mine while it is lying idle does not entitle him to a mechanic's lien. The labor contemplated by the statute is the actual work of mining in development of a mining claim. William v. Hawley, 144 Cal. 97, 77 Pac. 762 (1904).

Where one is employed at an oil well part of the time as a watchman and part of the time engaged in the pumping of oil, he is entitled to a mechanic's lien for that portion of his work consisting of the pumping of oil, but not for that as a watchman. Danaldson v. Orchard Crude Oil Co. 6 Cal. App. 641, 92 Pac. 1046 (1907).

By the provisions of section 3445 of the Idaho Revised Statutes of 1887, a party placed in charge of mining property consisting of both real and personal property has a lien on the personal property while in possession thereof. Idaho Comstock Min. & Mill. Co. v. Lundstrum, 9 Idaho 257, 74 Pac. 979 (1903).

Under a statute providing that every "person who shall furnish or perform any labor for any corporation organized for the purpose of mining, * * * shall have a lien for the amount due," etc., a

ing of the section above quoted. There has been much diversity of opinion and confusion as to the meaning of these words in a statute like ours, but we think that the Idaho court, under a statute identical in terms with ours, has announced the true rule, namely, that every person who deals directly with the owner of the property and who, in pursuance of a contract with him, performs labor or furnishes material, is an original contractor within the meaning of the statute. Colorado Iron Works v. Riekenberg, 4 Idaho, 262, 38 Pac. 651. The same holding prevails in Texas, Missouri, Virginia, and Wisconsin, and the cases from those states are cited in the Idaho opinion. We therefore hold that the claim of lien in this case was filed in time.

4. It is urged by appellee that the objections to the claim of lien heretofore discussed are not available to the appellant for the reason that his demurrer, being general, and, the complaint stating a cause of action against the owner of the property for money due, the demurrer

lien may be claimed for services as overseer and custodian of a mine and property. The statute does not restrict the labor to any particular class of laborers or kind of labor performed. It only requires that it shall be labor furnished or performed for the corporation. McLaren v. Byrnes, 80 Mich. 275, 45 N. W. 143 (1890).

A mechanic's lien will not be allowed for services in looking after mining property, paying the taxes thereon, listing it and keeping trespassers from entering and working the mines. Morrison v. New Haven & Wilkerson Min. Co., 143 N. C. 251, 55 S. E. 611 (1906).

IX. In Extracting Ore, etc.

A mine or pit sunk within a mining claim is a structure within the meaning of the statute giving a mechanic's lien for any labor performed upon a building, improvement, or structure, and therefore the lien may be claimed for labor in quarrying and extracting quartz and working the stopes and levels for the purpose of taking out rock to be crushed. Helm v. Chapman, 66 Cal. 291, 5 Pac. 352 (1885).

The breaking down and tearing away from the surface of the drifts and mine the quartz and substance of the mine, is labor performed in the construction and alteration or repair of the mine, within the provisions of sections 1183-1192 of the Code of Civil Procedure. Chappius v. Blankman, 128 Cal. 362, 60 Pac. 925, 20 Mor. Min. R. 461 (1900).

The labor performed in mining coal in the regular course of operating a mine is not performed in the making of any improvement within the meaning of the Illinois Mechanic's Lien Act. Henry v. Miller, 145 Ill. App. 628 (1908).

Men working on the surface of a mine are entitled to a lien equally with those working underground. Taylor v. Smith, 1 Ches. Co. Rep. (Pa.) 106 (1896).

X. In Sinking Shaft.

One who engages as a miner in sinking a shaft upon a mining claim is engaged in mining equally with one who extracts the gravel or ore therefrom, and is equally entitled to a lien for his services. Hines v. Miller, 122 Cal. 517, 55 Pac. 401, 19 Mor. Min. R. 609 (1898).

XI. In Cleaning and Washing Gold.

Time and labor devoted to cleaning up and washing gold taken out of a mine is labor done upon the mine. Cascaden v. Wimbish, 161 Fed. 241 (1908).

was, at any event, properly overruled, and consequently these objections to the claim of lien were never properly presented to the court below. In this he is in error. This was a separate demurrer by a subsequent incumbrancer. Had the demurrer been joint with the owner, perhaps his proposition would be sound, but, being a separate demurrer, it directly raises the question whether the complaint and claim of lien stated facts sufficient to constitute a cause of action against the defendant demurring. Mark Paine Lumber Co. v. Douglas Imp. Co., 94 Wis. 322, 68 N. W. 1013.

5. Appellant in his sixth assignment complains of the allowance by the court below of an attorney's fee to the appellee, and urges upon the court a reconsideration of the constitutionality of the lien statute under which the same was allowed. We do not, however, deem it necessary to re-examine the question, this court having settled it in favor of the constitutionality of the statute in the cases of Genest v. Las Vegas Masonic

XII. In Torpedoing Well.

Under chapter 440, New York Laws 1880, providing that any person who shall hereafter perform any labor in or about the sinking, drilling, or completing of any oil well or any well sunk or drilled for oil or gas, etc., shall have a lien, a lien may be claimed for torpedoing an oil well. Gallagher v. Karns, 27 Hun (N. Y.) 375 (1882).

XIII. In Working on Machinery or Tools.

Work done upon machinery or tools used in working or developing a mine is work done upon a mine, the Civil Code of California, section 661, providing that all machinery or tools used in working or developing a mine are to be deemed affixed to the mine. Malone v. Big Flat Gravel Co., 76 Cal. 578, 18 Pac. 772 (1888).

XIV. General Labor in Lime-Kiln.

Under the New Mexico Act, providing that "all miners, laborers and others who work or labor to the amount of twenty-five dollars or more in or upon any mine, lode or deposit * * * shall have and may each respectively claim and hold a lien, and that all artisans, mechanics and others who perform work or labor * * * for the construction or repair of any building or other superstructure shall have and may claim and hold a lien," labor performed in a lime-kiln, closing lime bins and gathering up tools at a lime quarry and lime-kiln, all on the mining claim, furnish a basis for a claim of lien upon the mining claim. Gray v. New Mexico Pumice Stone Co., principal case.

XV. In Cooking for Men.

Under section 262 of the Civil Code of Alaska, providing that "every mechanic, artisan, machinist, builder, contractor, lumber merchant, laborer, teamster, drayman and other person performing labor upon or furnishing material of any kind to be used in the construction, development, alteration or repair either in whole or in part of any * * * mine * * * shall have a lien upon the same for the work or labor done or material furnished," etc., where a number of men were hired at five dollars per day and board, and one of them devoted a portion of his time to cooking for himself and the others and the remainder of his time working on the shafts and tunnels, it was held he was entitled to a lien

Building Association, 11 N. M. 251, 67 Pac. 743, and Baldridge v. Morgan (N. M.), 106 Pac. 342. See Cascaden v. Wimbish, 161 Fed. 241, 88 C. C. A. 277.

6. The appellant contends that the claim of lien was for work performed by appellee of a character in part which furnished no basis for a claim of lien, and this raises the only question in the case requiring much consideration. As already appears, the labor performed by appellee was in working in a lime quarry as a laborer, working as a sort of foreman with other laborers and directing them in their work, working at the lime kiln, gathering up tools, closing lime bins, and caring for teams of horses, and nowhere does it appear how much labor was expended by him in these several capacities. The question under the circumstances in this case might well raise two points for consideration, namely: Is the work shown to have been performed by appellee within the terms of the claim of lien? Second. Is such work within the terms of the statute?

for his full time equally with the other laborers. Cascaden v. Wimbish, 161 Fed. 241 (1908).

XVI. In Furnishing Laborers.

One who contracts to furnish the labor of others in the development and working of a mine is entitled to a mechanic's lien as an original contractor. Malone v. Big Flat Gravel Co., 76 Cal. 578, 18 Pac. 772 (1888).

XVII. Under Contracts.

Where work is done by miners, sometimes by the day and at other times under small contracts to do a certain amount of work for a certain price, but all under the direction and superintendence of the foreman of the mine, it constitutes but one employment and the work done by the day and that done under the contracts may be included in one claim of lien. Skyrme v. Occidental Min. & Mill. Co., 8 Nev. 219, 9 Mor. Min. R. 370 (1870).

A mechanic's lien may be enforced for work done and materials furnished by one who contracted to drill an oil well and furnish the tools, rope, fuel, etc., to be used in the drilling under the provisions of the Pennsylvania Act of March 7, 1873, section 2. Vandergrift & Forman's Appeal, 83 Pa. St. 126, 9 Mor. Min. R. 397 (1876).

XVIII. In Building Elevator.

Lien may be claimed for an elevator connected with main shaft and nailed fast to the framework of the building, as an improvement necessary to the plant. Rogers v. C. C. C. Min. Co., 75 Mo. App. 114 (1898).

XIX. In Building Roads.

No provision is made in the Oregon Statute for constructing wagon roads, however necessary they may be to the successful operation of a mine. When means are given for certain specified work, the rule of *Expressio unius est exclusio alterius* applies, and hence no lien attaches for that class of work. Williams v. Toledo Coal Co., 25 Or. 426, 36 Pac. 159, 42 Am. St. Rep. 799 (1894).

Under the Montana Statute giving any person performing any work on or furnishing any material for any building, structure, mining claim, etc., a lien on the property extends to any character

The first point might be a very serious one under the terms of the claim of lien, which declares, "Said lien being claimed for labor and services in the construction of the mining claim on said land;" but the point does not seem to be raised in the brief. It may well be doubted whether labor in a lime kiln in gathering up tools, caring for teams of horses, or closing lime bins is work in the construction of a mining claim, if, indeed, the word "construction" can be properly used in connection with work upon a mine. However, the draftsman of a claim of lien evidently intended by the use of the word to confine the scope of the lien to such labor as was actually performed in the mining of lime rock, and there is a variance between the proof and the allegation in this regard. At any rate, as above stated, this point does not seem to be raised.

The second point, however, is raised, and it becomes necessary to determine whether the work shown to have been performed is within the

of labor, whether in the construction work as such or in repairs and alterations or in mining work or in building roads or cutting cord wood, including the labor expended in building roads or preparing fuel for use in producing power to carry on the enterprise. It may be said it is as much labor done on the claim as is that expended in the use of a pick or hammer and drill in the workings of the mine above or below ground. The same may be said of operatives in the mill whose duty requires them to keep the machinery in order and to clear away debris which accumulates at any time in and about the buildings erected to house the machinery. McIntyre v. Montana Gold Mountain Min. Co., 41 Mont. 87, 108 Pac. 353 (1910).

XX. In Hauling Quartz.

Under statute providing that all persons performing labor for carrying on any mill shall have a lien on such mill for such work or labor done, the hauling of quartz to the mill is labor performed within the meaning of the act, and for which a mechanic's lien may be enforced. In re Hope Min. Co., 1 Sawy. 710, Fed. Cas. No. 6681, 9 Mor. Min. R. 364 (1871).

The lien of a mechanic is a remedy in the nature of a charge on land, given by statute to the persons named therein to secure a priority or preference of payment for the performance of labor or supply of materials to buildings or other improvements to be enforced against the particular property in which they have become incorporated. The labor of hauling ore away from a mine to a mill does not enter into the improvement of the mine and therefore no mechanic's lien can be had for such labor. Barnard v. McKenzie, 4 Colo. 251, 9 Mor. Min. R. 403 (1878).

The hauling of quartz to a mill can properly be said to be labor in carrying on the mill, for which a mechanic's lien is allowed. Gould v. Wise, 18 Nev. 253, 3 Pac. 30 (1884).

A laborer hauling coal from a mine to a wharf, held entitled to a lien. Appeal of Farmers' Bank of Schuylkill Co., 1 Walk. (Pa.) 33 (1862).

XXI. In Caring for Team.

The labor of a lien claimant in caring for a team of horses upon a mining claim, and which are used in the mining

terms of the statute. As to all of the classes of labor, save that of caring for the teams of horses, there would seem to be no difficulty whatever in concluding that the same furnishes a basis for a claim of lien under the statute. They were all work upon or in a mining claim within the terms of our statute. They all bear direct relations to the mining operations being carried on by the owner of the premises, and consequently in most if not all of the states would be held to furnish the basis for a claim of lien. But the labor expended in caring for the horses of the mine owner, the extent and value of which is unknown, is more remote, and under some of the mechanic's lien statutes would be held not to furnish a foundation for a claim of lien. Of course, the original idea underlying the mechanic's lien statutes was that, where the person contributed his labor or materials to the construction of a building or other improvement, the owner ought in equity and good conscience be made to pay for the increased value of the property by

operations thereon, is subject of lien. Gray v. New Mexico Pumice Stone Co., principal case.

XXII. Incidental Labor.

Where liens are allowed for labor which might be termed incidental, it must be directly done for and connected with or actually incorporated into the building or improvement, and the statute will not be extended to cover services indirectly and remotely associated with the construction work. Rara Avis Gold & S. Min. Co. v. Bouscher, 9 Colo. 385, 12 Pac 433 (1886).

XXIII. Work Done Away from Mine.

A mechanic's lien will not attach to a quarry for labor done in preparing slate taken therefrom for market, where the labor is done after the slate is severed and taken to a distance from the quarry. Union Slate Co. v. Tilton, 73 Me. 207 (1882).

XXIV. In Prospecting.

The drilling of an oil well is a "job" within the meaning of the Ohio Mechanic's Lien Law. Devine v. Taylor, 12 Ohio Cir. Ct. Rep. 723, 4 Ohio Cir. Dec. 248 (1894).

Under the Oregon Act of 1891, providing that every person who shall do work or furnish materials for the working or development of any mine, lode, mining claim or deposit yielding metals or materials of any kind, or for the working or development of any such mine, lode or deposit in search of such metals or materials, etc., one who engages in such work upon a claim in which minerals are not found is entitled to a lien the same as if the minerals had been found. Williams v. Toledo Coal Co., 25 Or. 426, 36 Pac. 159, 42 Am. St. Rep. 799 (1879).

XXV. At Request of One Other than Owner.

No mechanic's lien can be enforced for labor done for and at the request of one whom the laborer at the time of doing the work knew was not the owner of the property or authorized by the owner to have the work done. Jurgenson v. Diller, 114 Cal. 491, 46 Pac. 310, 55 Am. St. Rep. 83 (1896).

A laborer cannot claim lien for work done for one who held a bond upon a mine by which he agreed to pay all expenses, where the laborer had notice and knowledge of such bond and agree-

reason of the labor or materials of the lien claimant. But in mining it cannot be said that the labor of a man adds to the value of the mine. On the other hand, it necessarily, except in strictly prospecting and development work, detracts from the value of the mine by removing therefrom its ores, which, when exhausted, leave the mine valueless. It may well be argued, therefore, that the statutes extending liens to laborers upon mining claims were intended to include all laborers of every class and kind who may be employed in and about the mining operations thereon. Where the specific relation which the labor of a lien claimant must bear to the property is pointed out in the statute, of course no other labor furnishes the basis for a claim of lien, but where the statute is general in terms, as ours is, and provides for a lien of any person who performs labor upon or in a mining claim, we see no reason why labor of any class bearing a direct relation to the mining operations should not be sufficient to form a basis for a claim of lien. It has been so held under a statute identical in terms with ours. Thompson v. Wise Boy Co., 9 Idaho 363, 74 Pac. 958; Idaho Co. v. Davis, 123 Fed. 396, 59 C. C. A. 200. See 27 Cyc. 770; Cascaden v. Wimbish, 161 Fed. 241, 88 C. C. A. 277. We therefore hold that the labor expended by a lien claimant in care of the teams of horses upon a mining claim, and which are used in the mining operations thereon, as well as labor performed in a lime kiln, closing lime bins, and gathering up tools at the lime quarry and lime kiln, all on the mining claim, furnish a basis for a claim of lien upon the mining claim. It follows, therefore, that the contention that the claim of lien is for classes of labor for which no lien can be allowed is not well founded.

ment. Reese v. Bald Mountain Consol. G. Min. Co., 133 Cal. 285, 65 Pac. 578 (1901).

A mechanics lien may be enforced for labor in extracting ore from ledges already exposed, and drifting and stoking for the purpose of opening up new ore bodies and discovering better ore, when the work was done at the direction of lessees, under contract by which they were to work and develop a mine and pay the lessors a percentage of the profits, and in such case the interests of both the lessors and lessees are subject to the lien. Higgins v. Carlotta, 148 Cal. 700, 84 Pac. 758, 113 Am. St. Rep. 344 (1906).

A person or corporation cannot unlawfully take and hold possession of the property of another and create liens against it. Idaho Gold Min. Co. v. Winchell, 6 Idaho 729, 59 Pac. 533, 96 Am. St. Rep. 290 (1899).

XXVI. Apportionment of Lien.

Work performed upon a dwelling-house situated upon a mining claim and in a tunnel situated upon the same claim is work performed upon the same property, and does not come within section 1188 of the California Code of Civil Procedure, requiring work to be apportioned when done upon two or more separate pieces of property. Dickenson v. Bolyer, 55 Cal. 285, 9 Mor. Min. R. 415 (1880).

7. A point not mentioned in the briefs seems to deserve at least passing notice. Our statute provides for liens upon mining claims. The words "mining claim" in the mining country have a certain well-understood meaning, namely, a portion of the public mineral lands of the United States, to which qualified persons may first obtain the right of occupancy and possession by means of location; and secondly, title by pursuing certain prescribed methods therefor. It appears in this case that this mine is a limestone mine consisting of a section of land. How the title of the defendant owner was acquired does not appear, but it is quite within the possibilities that the same may have been acquired from the government by the predecessor in title of the present owner by means of an agricultural patent of some kind. The question, if such were the case, would then arise whether the lien statute has any application to labor performed upon any such lands. It is entirely unnecessary for us to decide the question in this case as the same is not related, and there is nothing before us to show the origin of the title. See 27 Cyc. 534; Morse et al. v. De Ardo et al., 107 Cal. 622, 40 Pac. 1018.

There being no error in the record, the judgment of the lower court will be affirmed; and it is so ordered.

POPE, C. J., and McFIE, WRIGHT, and MECHEM, JJ., concur. ABBOTT, J., having tried the case below, did not participate in this decision.

XXVII. Lien Void in Part Void in Toto.

Where a lien is claimed for a lump sum for services, a part of which is for services for which no lien is allowed, the whole claim is void. Boyle v. Mountain Key Min. Co., 9 N. M. 237, 50 Pac. 347 (1897).

NATIONAL MINES CO. v. SIXTH JUDICIAL DISTRICT COURT HUMBOLDT COUNTY, et al.

[Supreme Court of Nevada, June 20, 1911.]

— Nev. —, 116 Pac. 996.

1. **Court Survey of Contiguous Mines—Constitutional Law.**
A statute empowering a court, upon proper showing, to order a survey of contiguous mining property although no suit is pending, is not unconstitutional.

2. **Same—Inherent Power of Equity.**
Courts of equity have the inherent power to order a survey of contiguous mining properties in cases pending before them.

3. **Same—Act Construed—Pending Suit.**
Section 3 of an act for the protection of mines and mining claims giving the right to obtain from court an order directing a survey of contiguous mining properties, held not to authorize an order except in a pending suit.

4. **Statutes—Construction.**
In construing a statute the language of which is not clear the law as it existed prior to the enactment should be considered.

5. **Same.**
Where an act is equally susceptible of two constructions the court will not presume that a radical change in existing procedure was intended.

6. **Same.**
Where the same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense throughout.

7. **Same—Word "Maintain."**
The word "maintain" as used in statutes in reference to actions, comprehends frequently the institution as well as the support of an action, but in the statute in question it is construed to mean merely the support of an action.

Original proceedings in certiorari by the National Mines Company against the Sixth Judicial District Court of the County of Humboldt and the judge thereof to review an order of the judge. Order annulled.

For petitioner—L. G. Campbell.

For respondents—Curler & Martinson and Rufus C. Thayer.

This is an original proceeding in certiorari to review an order of the Sixth Judicial District Court of the State of Nevada, in and for the County of Humboldt, the Honorable Edward A. Ducker, district judge thereof, presiding, directing a survey of the boundaries and underground

NOTE.
As to the marking of a mining location on the ground, see note to Flynn Group Mining Co. v. Murphy, *post*, p. 619.

workings of the Charleston and West Virgina lode mining claims, the property of the petitioner herein.

The facts, briefly stated, that raise the question of law presented in this proceeding, are as follows: One H. E. Orr on the 19th day of December, 1910, filed in the Sixth Judicial District Court of the State of Nevada, in and for Humboldt County, his affidavit and application, in which he alleged among other things, that he holds a contract for the working of the Charleston No. 1, West Virgina No. 1, and West Virginia Fraction lode mining claims in the National mining district, Humboldt County, Nev., and describing the same, and that the petitioner herein owns the Charleston and West Virginia lode mining claims, in said mining district, and describing the same, and that the petitioner herein is in possession thereof, that the said claims of the applicant H. E. Orr, and the said claims of the petitioner herein, are in the main contiguous; that the said H. E. Orr has reason to believe, and does believe, that the petitioner herein working beyond its lines on the strike of the Charleston vein, and into the claims of the said applicant, mentioned above; that there was not at the time said application and affidavit were filed, or at any time hitherto, a suit pending in the said district or any court between the said H. E. Orr and the petitioner herein; that on the said 19th day of December, 1910, the Honorable Edward A. Ducker, judge of the said court, entered an order on said affidavit and application, requiring the petitioner herein to appear in said court on the 29th day of December, 1910, and show cause why the order for survey prayed for in the said affidavit and application should not be made; that on the said 29th day of December, 1910, the petitioner herein appeared in said court, and objected to said court hearing said matter or making said order of survey, for the reason and on the ground that the said court had no jurisdiction to hear the same or make said order in the absence of a pending suit between the said parties in the said court; that such objection was by said court overruled, and that certain affidavits were then filed therein by the petitioner herein and said court proceeded to hear the said application of the said H. E. Orr; that on the 21st day of January, 1911, the said court, through its said judge, made an order on said affidavit and application, as prayed for therein, among other things appointing four surveyors to survey the surface boundaries of the said property of the petitioner herein, and all the underground workings thereof. The order for the survey in question is based upon the provisions of section 3 of an Act of the Legislature of the Territory of Nevada, entitled "An act for the protection of mines and mining claims," approved December 17, 1862, the material portions of which read as follows:

"Section 1. Any person or persons, company or corporation, being the owner or owners of, or in the possession under any lease or contract for the working of any mine or mines within the state of Nevada, shall have the right to institute and maintain an action, as provided by law, for the recovery of any damages that may accrue by reason of the manner in which any mine or mines have been or are being worked and managed by any person or persons, company or corporation, who may be the owner or owners, or in possession of and working such mine or mines under a lease or contract, and to prevent the continuance of working and managing such mine or mines in such manner as to hinder, injure, or by reason of tunnels, shafts, drifts or excavations, the mode of using, or the character and size of the timbers used, or in any wise endangering the safety of any mine or mines adjacent or adjoining thereto. And any such owner of, or in the possession of any mine or mining claim, who shall enter upon or into, in any manner, any mine or mining claim, the property of another, and mine, extract, excavate or carry away any valuable mineral therefrom, shall be liable to the owner or owners of any such mine or mines trespassed upon in twice the amount of the gross value of all such mineral mined, extracted, excavated or carried away, to be ascertained by an average assay of the excavated material or the ledge from which it is taken." (As amended, Stats. 1891, p. 37).

"Sec. 3. Any person or persons named in the first two sections of this act, shall have the right to apply for and obtain from any district court, or the judge thereof, within this territory, an order or survey in the following manner: An application shall be made by filing the affidavit of the person making the application, which affidavit shall state, as near as can be described, the location of the mine or mines of the parties complained of, and as far as known, the names of such parties; also, the location of the mine or mines of the parties making such application, and that he has reason to believe, and does believe, that the said parties complained of, their agent, or employees, are or have been trespassing upon the mine or mines of the party complaining, or are working their mine in such manner as to damage or endanger the property of the affiant. Upon the filing of the affidavit as aforesaid, the court or judge shall cause a notice to be given to the party complained of, or the agent thereof, which notice shall state the time, place, and before whom the application will be heard, and shall cite the party to appear in not less than five or more than ten days from the date thereof, to show cause why an order of survey should not be granted; and upon good cause shown, the court or judge shall grant such order, directed to some competent surveyor or surveyors, or to some competent mechanics, or miners, or both, as the case may be, who shall proceed to make the

necessary examination as directed by the court, and report the result and conclusions to the court, which report shall be filed with the clerk of said court. The costs of the order and survey shall be paid by the persons making the application, unless such parties shall subsequently maintain an action and recover damages, as provided for in the first two sections of this act, by reason of a trespass or damage done or threatened prior to such survey or examination having been made, and in that case, such costs shall be taxed against the defendant as other costs in the suit. The parties obtaining such survey shall be liable for any unnecessary injury done to the property in the making of such survey." Comp. Laws, §§ 250, 252.

NORCROSS, J. Petitioner herein contends that the respondent court was without jurisdiction to make the order of survey in question, for the reason that section 3 (Comp. Laws, § 252) *supra*, does not authorize such order in advance of a pending suit; that, if said section may be so construed as to permit such order in advance of a pending suit, then the same would be in violation of the Constitution and void; that the said applicant, H. E. Orr, was not within the class of persons mentioned in section 1 of said act (Comp. Laws, § 250) *supra*, and hence not entitled to an order in any event under its provisions. There have been but few cases considered by the courts involving the question of the power of a court to make an order for a survey of a mine prior to the institution of suit. It is conceded that, in the absence of statutory authority, such an order may not be made. It was held by the Supreme Court of Montana in St. Louis M. & M. Co. v. Montana Co., 9 Mont. 288, 23 Pac. 510, that under the provisions of section 376, Code Civ. Proc., the then practice act of that state, an order could be made without a suit pending for a survey of the underground workings of a mine in the possession of another in which the party making the application has a right or interest. Upon appeal to the Supreme Court of the United States, involving the validity of the judgment, as tested by the fourteenth amendment of the Federal Constitution, the judgment of the Montana court was affirmed. 152 U. S. 160, 14 Sup. Ct. 506, 38 L. Ed. 398. In this later case the court, by Brewer, J., said: "The frequency with which these orders of inspection have of late years been made, and the fact that the right to make them has never been denied by the courts, is suggestive that there is no inherent vice in them. And, if the courts of equity by virtue of their general powers may rightfully order such an inspection in a case pending before them, surely it is within the power of a state by statute to provide the manner and conditions of such an inspection in advance of suit." Section 376 of the earlier practice act of Montana was incorporated in the practice act of that state subsequently adopted and

is now section 1317 of the present practice act (section 6876, Revised Codes of Montana). It was held in State ex rel. Anaconda C. M. Co. v. District Court, 26 Mont. 396, 68 Pac. 570, 69 Pac. 103, that this section only applied in cases in which the parties seeking a survey had an interest in the property sought to be surveyed, and that in all other cases the power to order a survey was governed by sections 1314 and 1315, Code Civ. Proc. 1895 (Rev. Codes, §§ 6874, 6875), by the provisions of which a survey could not be ordered excepting in a pending action. This decision has been affirmed in several subsequent decisions of the Montana court.

In the case of People ex rel. Calumet G. M. & M. Co. v. De France, Judge, 29 Colo. 309, 68 Pac. 267, the Supreme Court of Colorado annulled an order of the trial court directing a survey of certain mining property in advance of a suit, and, in construing the provisions of section 364 of the Colorado Code of Procedure, held that such section did not contemplate the making of such an order excepting in the case of a pending suit. There is but one other case to which our attention has been called or which we have been able to find involving the question of an order of survey made in the absence of a pending suit, to wit, the case of In re Carr, 2 Kan. 688, 35 Pac. 818. The Carr case was in habeas corpus and the petitioner who had been committed for contempt for refusing admittance to the surveyor was discharged, but not upon the ground that the lower court was without jurisdiction to make the order in question. The Kansas statute applied only to coal mines and empowered the court or judge, upon the affidavit of a person in which it shall be made to appear that such person shall have good reason to believe that another person or persons, corporation or corporations, are without authority encroaching upon the land of the person aggrieved to make an order directing the county surveyor to survey the mine or mines of the person or persons, corporation or corporations accused for the purpose of ascertaining the truth thereof. It is further provided in the act that:

"Sec. 3. Whenever it shall be made to appear by petition verified by the oath of the plaintiff, his agent or attorney, and by the survey of the county surveyor, that any person or persons, corporation or corporations, is or are without authority, mining or taking coal from the land of the plaintiff, whether held by lease or otherwise, it shall be the duty of the proper district court in term time, or the judge thereof in vacation, to grant a temporary injunction restraining such person or persons, corporation or corporations, from mining or taking coal from such land till the further order of the court or judge.

"Sec. 4. The proceedings in such case shall be in all respects similar to the course of procedure in actions for injunction." Laws 1877, c. 127.

The Kansas statute was attacked as being unconstitutional, but whether the attack was made upon the ground that the legislature had no power to provide for such a survey in the absence of a pending suit does not appear. The constitutional question is disposed of by the majority opinion of the court in the following terse sentence: "We perceive no good reason for holding the act unconstitutional so far as it applies to property in Kansas." Johnson, J., concurred in the view that a survey could not be ordered or compelled in territory outside of the state (the coal mine being upon the boundary line between the states of Kansas and Missouri), but stated: "I do not desire to express any opinion upon the other objections made to the validity of chapter 127 of the Laws of 1877." In the opinion of the court by Allen, J., appears the following: "The remedy afforded by the act is an injunction. The survey is merely preliminary and for the purpose of ascertaining whether a cause of action exists." The Kansas statute has never been involved in any subsequent case thus far reported.

We think it may be conceded, at least for the purposes of this case, that there is no inherent constitutional impediment against the legislature empowering the court or judge, upon the proper showing, to make an order for the survey of mining property in the absence of a pending suit, and that the only question we need consider in the present case is whether the statute of this state in question empowers a district court or judge to make such an order.

It is now well settled that courts of equity have inherent power to make orders of this character in cases pending before them. Most, if not all, of the mining states, however, have statutes regulating the procedure to obtain these orders. These statutes generally provide for such orders to be made only in pending actions, and the only exceptions thereto may be found in the Kansas and Montana statutes heretofore referred to, unless our own statute should be construed also to be an exception to the general rule.

In enacting the statute of December 17, 1862, *supra,* the territorial legislature did not use language that was the most apt to express clearly its purpose and intent. This was doubtless the first statute passed in this country governing an order of survey of mining properties to be obtained by a party who had no interest therein, but who was affected by the operations thereof. Section 1 of the act, as originally passed, did not contain the last sentence quoted, *supra,* which was embodied therein by the amendment of 1891. Counsel upon both sides in this proceeding have presented elaborate arguments upon the construction of section 3 of the act; counsel for petitioner in this proceeding contending that the section should be construed only to permit an order for survey after the action is instituted, and counsel for the respondent contending for the

contrary construction. One need but read the arguments advanced by respective counsel to appreciate that the section is ambiguous in many particulars.

In construing any statute the language of which is not clear, it is well first to consider the law as it existed prior to the enactment. At the time this statute was enacted, no court of equity in this country had ever exercised its inherent power to order a survey of the underground workings of a mine, and, indeed, it is doubtful if any other character of survey had been so ordered. The first instance in this country in which a court of equity had ordered such a survey was in the Circuit Court of the United States for the District of Nevada in the case of Thornburgh v. Savage Mining Company, Fed. Cas. No. 13,986, 7 Mor. Min. Rep. 667, decided in 1867. The next case reported is that of Stockbridge Iron Co. v. Cone Iron Works, 102 Mass. 80, decided in 1869.

From the beginning of about the nineteenth century courts of chancery in England exercised the power in pending suits to order surveys of the surface and underground workings of mining properties. 3 Wigmore on Evidence, § 1862, p. 2456. Sections 258 and 259 of the Practice Act of the Territory of Nevada, which substantially corresponds to sections 260 and 261 of our present Practice Act (Comp. Laws, §§ 3355, and 3356), provided as follows:

"Sec. 258. The court in which an action is pending for recovery of real property, or a judge thereof, may, on motion, upon notice to either party, for good cause shown, grant an order allowing to such party the right to enter the property and make a survey and measurements thereof, for the purpose of the action.

"Sec. 259. The order shall describe the property, and a copy thereof shall be served on the owner or occupant, and thereupon such party may enter upon the property with necessary surveyors and assistants and make such survey and measurements; but if any unnecessary injury be done to the property, he shall be liable therefor."

From the foregoing it appears that at the time the Statute of 1862 was enacted no court possessed power to make an order of survey excepting in a pending suit. Courts of equity in this country had not up to that time assumed the exercise of their inherent powers in this regard, and they were then undefined. The statute of the territory had provided for an order of survey in pending actions for the survey of real property, but whether this statute was or is broad enough to permit a survey of the underground workings of a mine in an action for damages in trespass committed below the surface of the earth may seriously be questioned.

We think it appears from a reading of section 1 of the act in question that the legislature intended either to create a new cause of action where none existed before or to make clear and unquestionable what may have been deemed a doubtful right, particularly that of enjoining mine owners or operators from so conducting their operations as to endanger the safety of adjoining properties. The right to recover damages for a trespass was so well known and understood that it needed no statutory provision to create or clearly define such right of action, and this may account for the specific reference to trespass in the third section and not in the first as originally enacted. There was, however, just as much reason for a survey in the case of an underground trespass as in the other causes of action mentioned in section 1. The manifestly crude manner in which the act was prepared and the ambiguous language used has left it open to argument as to whether the legislature intended that an order of survey in any of the cases mentioned in the statute could be made except in a pending suit.

Were the act equally susceptible of two constructions, we would be disposed to hold that the legislature would not be presumed to intend a radical change in existing procedure, and would construe the act in harmony therewith. In other words, we would not construe a statute so as to permit such an order for survey without a suit pending in the absence of language clearly manifesting such an intent upon the part of the legislature. We think section 3 does not express such a clear intent, but, upon the contrary, there is language used which, under a well-recognized rule of statutory construction, manifests a contrary intent. Both parties to this proceeding have laid stress upon the following sentence of section 3 as supporting their divergent views as to the legislative intent as deduced from the language of the statute: "The costs of the order and survey shall be paid by the persons making the application, unless such parties shall subsequently maintain an action and recover damages as provided for in the first two sections of this act," etc. We think the contention of counsel for petitioner herein supported by the better reasoning. If the word "maintain" as used in section 3 is given the same meaning as it has in section 1, then it means to support and carry on an action that has theretofore been instituted. The word "maintain," as used frequently in statutes in reference to actions, comprehends the institution as well as the support of the action, and the statutes of this state contain many instances where it is used in this broader sense. It is used in other instances to express a meaning corresponding to its more restricted and more proper definition, as in the cases of Carson-Rand v. Stern, 129 Mo. 381, 31 S. W. 772, 32 L. R. A. 420, and Cal. Savings Co. v. Harris, 111 Cal. 133, 43 Pac. 525, cited in peti-

tioner's brief, where it was construed not to comprehend the institution of an action, but merely the support thereof. In section 1 the two words are used together, "institute and maintain"; and hence both are used in their restricted sense. If both words had been used in section 3, there would have been no room for construction. The power to make the order prior to the institution of the suit would have been manifest. The word "maintain" only was used, and it will be presumed to be used in the same sense and with the same meaning in which it was used in section 1; there being nothing in the statute to clearly indicate that it was used in any different sense.

"Where the same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense throughout; and, where its meaning in one instance is clear, this meaning will be attached to it elsewhere, unless it clearly appears from the whole statute that it was the intention of the legislature to use it in different senses." 36 Cyc. 1132, and authorities cited in notes. Much stress has been laid on the fact that section 3, *supra*, does not use the word "plaintiff" as the one who may apply for the survey or upon whose behalf such application may be made, but uses instead the words "any person or persons named in the first two sections of this act, shall have the right to apply," etc., also, that the affidavit is required to set forth facts that would be disclosed by the complaint were an action pending, as indicating that the legislature did not contemplate a pending suit at the time of the application and order for the survey. Conceding the force of this argument, we do not deem it sufficient to outweigh the reasons given in support of the contrary construction. The only person or persons named in section 2 of the act in question is the judgment debtor or debtors, and it is difficult to conceive why the legislature should have referred to section 2 at all, as that section only provides that the judgment recovered in the action shall be a lien on the property of the judgment debtors. A judgment debtor must, before he can become such, be a party to an action. If a reference to section 2 is any aid to construing section 3, we are unable to see wherein it tends to support the position of counsel for respondent. Section 1 specifies all those who have a right of action under the provisions of that section, and any within the class mentioned also have the right to apply for an order of survey, but this reference does not preclude the idea that such persons shall be parties to a pending suit. A complaint may not of necessity contain all the matters required to be set forth in the affidavit for the order of survey, and it is not required to be sworn to, and this may have been the reason why the legislature specified with particularity what the affidavit should contain. In any event, it is not inconsistent with the construction of the section so as to

require a pending suit. The Colorado statute, like ours, does not use the terms "plaintiff" and "defendant" to indicate the parties to the proceeding to obtain the order, but the Colorado court construed their statute to apply only in case of a pending suit. While possibly not a matter to be considered of any considerable weight, it is worthy of note that the text-writers on mining law have placed the Nevada statute in question in the category of those requiring an action pending before an order of survey may be made. Lindley on Mines, § 873; Snider on Mines, § 1637; Morrison's Mining Rights (14th Ed.), p. 432; Costigan on Mining Law, p. 519. Mr. Snider in his work says: "It will be readily observed that all these statutes agree upon one proposition, namely, that an action must be pending at the time the application for a survey is made."

Having reached the conclusion that the statute in question does not authorize an order of survey excepting in a pending suit, it follows that any such order would be in excess of jurisdiction and void.

The order under review herein is annulled.

SWEENEY, C. J., concurs.

TALBOT, J. (dissenting). I am unable to concur in all the conclusions reached by my learned associates. As it has been held by the Supreme Courts of Kansas, Montana, and of the United States that the legislature may constitutionally provide for surveys without the institution of suit, and as all of the members of this court concede that this is a correct construction of the law, and no court has decided to the contrary, the only question for determination is whether the legislature has authorized the ordering of surveys before an action is commenced.

A careful examination of the statute makes it clear that the legislature has empowered the district courts and judges to order the making of surveys without suit, and has designated the persons upon whose application they may be ordered. The statute neither directly nor by implication provides that application for the survey may be made only by a party who has previously commenced an action, or that any suit must be pending before the applicant will be entitled to an order for the survey. Consequently the decision of the majority of the court legislates into the act a condition not placed there by the legislature. This is quite apparent from the first few lines of section 3 of the statute, which provide that: "Any person or persons named in the first two sections of this act, shall have the right to apply for and obtain from any district court, or the judge thereof, within this territory, an order or [of] survey in the following manner: An application shall be made by filing an affidavit of the person making the application, which affidavit shall state, as near

as can be described, the location of the mine or mines of the parties complained of, and as far as known, the names of such parties; also, the location of the mine or mines of the parties making such application, and that he has reason to believe and does believe that the said parties complained of, their agent, or employees, are or have been trespassing upon the mine or mines of the party complaining, or are working their mine in such a manner as to damage or endanger the property of the affiant." And from the first few lines of section 1, which designate that: "Any person or persons, company or corporation, being the owner or owners of, or in possession under any lease or contract for the working of any mine or mines within the State of Nevada, shall have the right to institute and maintain an action, as provided by law, for the recovery of any damages that may accrue by reason of the manner in which any mine or mines have been or are being worked." Comp. Laws, §§ 250, 252. These provisions plainly allow any person, company, or corporation, being the owner of, or in possession under a lease or contract for the working of, any mine "to apply for and obtain from any district court, or the judge thereof, an order or survey, by filing the affidavit of the person making the application," stating the things required by the statute to be in this affidavit, none of which require, or make any reference to, a pending or other suit. The statute then directs positively that: "Upon the filing of the affidavit as aforesaid, the court or judge shall cause a notice to be given to the party complained of, or the agent thereof, which notice shall state the time, place, and before whom the application will be heard, and shall cite the party to appear in not less than five or more than ten days from the date thereof, to show cause why an order of survey should not be granted; and upon good cause shown, the court or judge shall grant such order, directed to some competent surveyor or surveyors, or to some competent mechanics, or miners, or both, as the case may be, who shall proceed to make the necessary examination as directed by the court, and report the result and conclusions to the court, which report shall be filed with the clerk of said court." The language quoted is all that is provided by the statute, or that is required, for the obtaining of the order for survey, and the interpolation of the requirement by the opinion of the majority of the court of the institution of a suit before the application or order for the survey may be made is a condition not specified or required by the language of the act, and is purely judicial legislation. If this court in this proceeding may go beyond its constitutional power of construing the laws and enter the domain of legislation, it may add other requirements to this and other statutes after persons aggrieved have brought actions or proceedings in compliance with the language of the statute upon which they rely, and

they may be defeated and mulcted in costs because the court after hearing may exact some condition which has not been provided by the legislature, and of which they were not aware, and there will be little stability, certainty, or safety in our laws. If a future legislature should desire to allow surveys to be ordered without suit, notwithstanding the decision in this case, what language could it use in an amendment or a new act more broadly indicative of this intention than the language now in section 3 relating to the application or order for the survey, unless by negatively stating that suit need not be brought—something that no rule of construction requires?

Effort is made to justify the decision by a technical construction of the next succeeding sentence in section 3, which relates only to costs of the order and survey after they have been made, and which provides no requirement and makes no reference in regard to the application or order for the survey, and which sentence reads: "The cost of the order and survey shall be paid by the persons making the application, unless such parties shall subsequently maintain an action and recover damages, as provided for in the first two sections of this act, by reason of a trespass or damage done or threatened prior to such survey or examination having been made, and in that case, such costs shall be taxed against the defendant as other costs in the suit." True, a word used in different sections of the statute will ordinarily be construed as having the same meaning in the different places in which it is used, unless it is manifest that the legislature intended it in a different sense. If the word "maintain," as used in the sentence just quoted, be considered as referring to a suit previously brought, as held in the opinion, this construction, as given by a majority of the court, would refer only to the costs of the order and survey, and not to the application for the making of the order, and would only be equivalent to making this sentence of the statute read as it does now, with the addition after the word "action" of the words "commenced before the application for the survey was made." Hence the decision is based upon a section which relates only to costs, and to a question which is not before this court, and was not before the district court; for, no survey having been made, no question relating to the costs of the application and survey has been presented by the petition or pleadings. If the word "maintain" were among any of the provisions relating to the application or order for the survey, or if it be considered where it stands in the sentence relating only to costs, the language of section 3 in several particulars indicates to my mind that the legislature did not intend to require the institution of a suit before the application or order for the survey. If the legislature had intended to require the commencement

of a suit, it may be assumed that they would have so stated, and that the law-making body did not intend a condition which it did not impose. As there was a practice act already in force which provided for surveys in pending suits, it would have been useless for the legislature to enact that the applications and orders for the survey could be made only after suit. It would also seem that by providing that "the costs of the order and survey shall be paid by the person making the application, unless such parties shall subsequently maintain an action and recover damages," the legislature used the word "maintain" in its broad sense of "bringing and maintaining" an action, for otherwise the provision in relation to costs, including the word "maintain," would have been omitted from the section as useless; because, if the survey could be obtained only in a pending suit, the costs of the survey would be a part of the costs of the suit recoverable as other costs. It is a well-established rule of construction that a statute will be so construed as to give effect to its language, if possible. The omission from all that part of the act relating to the application and order for the survey of any language relating to a suit or to the parties to an action, and, on the contrary, the use of words not requiring the application for the survey to be made by a party to a suit or in an action pending, but allowing it to be made by any person who is the owner of, or in possession under a lease for the working of, adjoining ground, indicate that it was not the intention of the legislature to restrict the application for the survey to a party to an action previously commenced. The policy of the statute in this regard is a matter for legislative judgment; but, where the meaning of the statute is doubtful, the court will ordinarily so construe the statute as to give it an effect which carries the best policy, for in doubtful cases that is presumed to be the one which the legislature intended. The best policy would allow the survey to be ordered in advance of suit, so that the applicant for the survey would be able to ascertain the true conditions and facts, so that he may properly allege them in his complaint or not commence any action and avoid litigation if he is not justified as he may believe at the time he applies for the survey. Where there are grounds for a suit, there is no good reason why the law should confine a knowledge of the conditions to one of the parties, who is liable to the others, nor why the superintendent or manager of a mine should prevent an adjoining owner, whose ore he may have extracted hundreds of feet below the surface, and the stockholders in general, from ascertaining the facts. Light and truth are better than darkness and concealment. The statute wisely provides that "the parties making the survey shall be liable for any unnecessary injury done to the property in the making of the survey."

The word "maintain" is often used in our statutes in relation to corporations, administrators, and others with a meaning that includes the commencement of or right to institute an action. In 5 Words and Phrases Judicially Defined, p. 4278, in reference to the meaning of the word "maintain," there are cited, under the subdivision "As commence an action," seven cases holding that the word "maintain," when used in statutes relating to actions, is synonymous with or means "commence," "institute," or "begin." In one of these it is said: "Men, both in and out of the profession of law, often speak of maintaining an action, having reference to one yet to be instituted." Boutiller v. The Milwaukee, 8 Minn. 97, 101 (Gil. 72, 76); Byers v. Bourret, 64 Cal. 73, 28 Pac. 61; Smith v. Lyon, 44 Conn. 175, 179; Burbank v. Inhabitants of Auburn, 31 Me. 590, 591; Gumper v. Waterbury Traction Co., 68 Conn. 424, 36 Atl. 806; Kinsey & Co. v. Ohio Southern R. Co., 3 O. C. D. 249, 250; New Carlisle Bank v. Brown, 5 O. C. D. 94, 95. Under the next heading, "As continue an action," the same work states that "maintain," as used in a pleading, means to support what has already been brought into existence, and cites the two cases relied upon by the petitioner and the majority of the court (California Sav. & Loan Soc. v. Harris, 111 Cal. 133, 43 Pac. 525; Carson-Rand Co. v. Stern, 129 Mo. 381, 31 S. W. 772, 32 L. R. A. 420), and another case (Moon v. Durden, 2 Exch. 30), stating that "maintain" in pleading has a distinct technical signification.

It may be observed that the prevailing opinion rests upon these two cases defining the word "maintain," when used in a pleading, as meaning "to uphold or sustain an action already commenced," and upon the use of that word in section 3 of our statute, where it only relates to a question of costs, which is not before the court. Although "to maintain" is frequently and properly used in the sense of sustaining or upholding what has already been begun, these cases are distinguishable from, and are not in conflict with, the seven holding that the word "maintain," when used in a statute relating to actions, means or includes the meaning "commence," "institute," or "begin" an action. As used with "institute" in section 1, the word may be considered either in a restricted or in its broader sense as partly duplicating and partly extending the meaning covered by the word "institute." The language of the statute in Montana allowing the survey before suit and the Colorado act which was held not to so allow the survey are so dissimilar to ours that the decisions in those states do not lend aid to the construction of our enactment. The Colorado section relating to surveys closes with the provision that "the costs of the proceeding shall abide the result of the suit." Nor do the cases of Carson-Rand Co. v. Stern and California Sav. & Loan Soc. v. Harris apply to questions similar to the one here

involved. In them it was held that compliance with the law by a foreign corporation after instituting an action and before the filing of the plea in abatement of the suit on the ground that it had not complied with the statute will remove the right to defend on the ground of noncompliance under a statute providing that no action shall be maintained or defended in any court by a foreign corporation until it files articles of incorporation. These cases, and many others, including Ward v. Mapes, 147 Cal. 747, 82 Pac. 426, are reviewed in National Fertilizer Co. v. Fall River Five Cents Savings Bank, 196 Mass. 458, 82 N. E. 671, 14 L. R. A. (N. S.) 561, 565, and are there said to be in accordance with the weight of authority.

The district judge was duly empowered by the statute to order the survey without any suit having been commenced, and his action in this regard ought to be sustained.

CHARLES WEST, Attorney General of the State of Oklahoma, App'lnt, v. KANSAS NATURAL GAS CO., et al.

[Supreme Court of the United States, May 15, 1911.]

— U. S. —, 31 Sup. Ct. 564.

1. Pipe Lines—Interstate Commerce—Constitutional Law.

A statute conserving the supply of natural gas of the State of Oklahoma by prohibiting interstate pipe lines, is unconstitutional as a violation of the interstate commerce clause.

2. Same—Highways—Eminent Domain—Interstate Commerce.

An Oklahoma statute withholding a charter, the right of eminent domain, and the right to use the highways of the state from corporations organized for the purpose of operating interstate pipe lines, held unconstitutional as discriminating and unreasonably burdening interstate commerce.

Appeal from the Circuit Court of the United States for the Eastern District of Oklahoma

Action by the Kansas Natural Gas Company and others against Charles West, Attorney General of the State of Oklahoma to enjoin the enforcement of a statute. Judgment for plaintiffs. Defendant appeals. Affirmed.

For appellant—Charles B. Ames and Charles West.

For appellee—D. T. Watson, John G. Johnson, John J. Jones, and E. L. Scarritt.

Mr. Justice McKENNA delivered the opinion of the court:

This appeal brings up for review the decree entered in the circuit court of the United States for the Eastern District of Oklahoma in four suits consolidated by stipulation of the parties.

The suits had the common purpose of attacking the constitutional validity of a statute of Oklahoma, enacted in 1907, which is referred to as chapter 67 of the Session Laws of 1907. It is inserted in the margin in full.* All of the bills have the same foundation; that is, the

*Chapter 67. Pipe Lines—Regulating Gas and Oil Pipe Lines. Article 1.

An Act Regulating the Laying, Constructing, and Maintaining and Operation of Gas Pipe Lines for the Transportation of Natural Gas within the State of Oklahoma, Defining the Modes of Procedure for the Exercise of the Right of Eminent Domain for Such Purposes, Providing for the Inspection and Supervision of the Laying of Such Pipe Lines, and Limiting

right to buy, sell, and transport natural gas in interstate commerce notwithstanding the provision of the statute.

The suits were numbered in the court below 856, 857, 858, and 859. In 856 the Kansas Natural Gas Company was complainant. It is a corporation of the State of Delaware, and is engaged in the business of purchasing and distributing natural gas to consumers. It has a contract for the purchase of all the gas that can be produced from a certain well in Washington County, Oklahoma, and has acquired by purchase the right of way over the land upon which the well is located for the laying of a pipe line for the transportation of the gas, and proposes to extend its trunk pipe lines from the present southern terminus thereof in the State of Kansas, southward across the Oklahoma state line to the well. It also proposes to construct lateral and branch lines from the trunk line so extended, for the purpose of gathering and receiving such gas as it may be able to purchase from the owners of other wells. Its line will not be used in any way for local traffic, but only for the transportation of the gas from the wells in Oklahoma into the states of Kansas and Missouri.

In No. 857, the Marnet Mining Company, a corporation of West Virginia, is complainant. For the purpose of transporting from the producers of gas in the state of Oklahoma to purchasers and consumers in Kansas and Missouri, it has purchased a right of way over certain lands in the state, and proposes to construct a system of pipe lines to be used exclusively in such interstate transportation, and not in any way for local traffic.

In No. 858, A. W. Lewis, a citizen and resident of the State of Ohio, is complainant. He is the owner of an oil and gas lease by which he has acquired the right to construct wells on a certain tract of land in Oklahoma, and to take gas therefrom for the period of fifteen years. He has constructed a well, in accordance with his lease, which is capable of producing many millions of cubic feet of gas per day, which, being in excess of the local demand, he is unable to sell in the state; and he alleges that, being prevented from transporting it from the state, he

the Gas Pressure Therein, and Providing Penalties for the Violation Thereof. Be it enacted by the people of the state of Oklahoma.

Section 1. Any firm, copartnership, association, or combination of individuals may become a body corporate under the laws of this state for the purpose of producing, transmitting, or transporting natural gas to points within this state by complying with the general corporation laws of the state of Oklahoma, and with this act.

Sec. 2. No corporation organized for the purpose of, or engaged in, the transportation or transmission of natural gas within this state, shall be granted a charter or right of eminent domain, or

has suffered great loss and damage, and is deprived of his property without compensation.

In No. 859, O. A. Bleakley, a citizen and resident of Pennsylvania, is complainant. He has received from the Secretary of the Interior a right of way over the land of certain Indians over a designated route, paying to the Indian agent, by law and the rules and regulations of the Interior Department, the value of such right of way and the damages which the owners of the land over which he will pass for the laying and maintaining of a pipe line for the exclusive purpose of transporting natural gas from Oklahoma to Kansas.

It is alleged in the bills that a great number of wells have been drilled in the state at great expense, which are capable of producing more than 1,000,000,000 cubic feet of gas per day; that such amount is more than necessary for the demands of the people of the state, and the excess of supply is required to meet the wants of those residing in Missouri and Kansas. This want, it is alleged, may be supplied through the distributing plants now constructed and those contemplated by complainants, but that under the present conditions the owners are required to cease development work, and to keep large and valuable wells capped and inoperative, to their great injury and damage. It is alleged that in constructing lines for such transportation it will not be necessary to go along the highways of the state, but only across or over them; and that the lines to be constructed will be private lines, will endanger the lives and property of no one, and will be constructed in just conformity with all reasonable rules and regulations of the state.

It is averred that each of the defendants is charged, by virtue of his office, to execute the laws and Constitution of the state, and that he has undertaken to enforce the act hereinbefore referred to by proceedings in courts and by force of arms, and it is his intent and avowed purpose to prevent the transportation of gas beyond the limits of the state. The particular acts are set forth.

The bills pray discovery, that the act above referred to be declared void as being in conflict with section 8, art. 1, and the 14th Amendment of the Constitution of the United States, and that the defendants be enjoined from the things attributed to them. General relief is also prayed.

right to use the highways of this state, unless it shall be expressly stipulated in such charter that it shall only transport or transmit natural gas through its pipe lines to points within this state; that it shall not connect with, transport to or deliver natural gas to individuals, associations, copartnerships, companies, or corporations engaged in transporting or furnishing natural gas to points, places, or persons outside of this state.

Sec. 3. Foreign corporations formed for the purpose of, or engaged in the

Demurrers were filed to the bills, which were overruled (172 Fed. 545), and the defendants answered.

It was subsequently stipulated that the causes be consolidated and that appellant file an amended answer in each of the cases, and the answers of the other defendants be withdrawn. It will only be necessary to consider the amended answer, not, however, its details either of denial or averment, but only of certain facts especially relied on. These are: The present daily capacity of the gas wells of the state is approximately 1¼ billion cubic feet, the daily consumption being more than can be safely taken from them "without rapidly destroying their efficiency and depleting this great natural resource of the state." The gas area of the state is found in oil-producing sand, and the experience of all other natural gas fields demonstrates that the gas found in and taken from such sand is of much shorter duration than that found in purely gas sand, and if the acts of complainants be permitted "the field will be exhausted in a very short time." While it is true that the gas in Oklahoma is found in a gas and oil-producing sand which extends underneath large contiguous areas of land, every well takes from this unbroken area and diminishes the producing capacity of every other well of the entire field, the acts of the complainants, if permitted, will greatly damage and injure the entire field and take the property of all other owners therein, and "that the act of the Legislature of the State of Oklahoma, alleged in the bill to be unconstitutional, was an effort on the part of the legislature of the state to preserve the natural gas field of the state from destructive waste."

Certain cities of the states, which, by reason of their proximity to the gas field, should be supplied with gas, are not now supplied with it, and will never be if complainants are allowed to transport it from Oklahoma without regulation by laws of the state, and the population of the state is now 1,750,000, and is growing more rapidly than that of any other state in the Union. On account of the general prairie character of the state, it is without domestic fuel except coal and natural gas. Its supply of coal is growing rapidly more costly to produce, that the petroleum oil produced is practically transported from the state, "and that, substantially, the only natural, practical, usable fuel, both for domestic and industrial use, is natural gas."

business of, transporting or transmitting natural gas by means of pipe lines, shall never be licensed or permitted to conduct such business within this state.

Sec. 4. No association, combination, copartnership, or corporation shall have or exercise the right of eminent domain within this state for the purpose of constructing or maintaining a gas pipe line or lines within this state, or shall be permitted to take private or public property for their use within this state, unless expressly granted such power in accordance with this act.

The complainants may and are actually in the process of erecting enormous pumping stations outside of the state, which "might reasonably and would inevitably render entirely useless all the present lines (gas) in Oklahoma, and take away from the cities and towns of Oklahoma the entire practical use of their sole and natural fuel, because when gas is removed by the limited, prudent, and natural rock pressure, the nature and formation of the gas and oil sand is not radically changed; but if large pumps to pump out the wells, out of proportion to the rock pressure, are used, as are now actually threatened, by the complainant, the gas and oil sand is actually broken down as though shot with dynamite and other violence, and the salt water thereunder, always to be found, at once drowns out the wells, where rock pressure has been too greatly or rapidly decreased; that the use of the highways is a portion of the public property, and the same should be confined to those who supply all alike who may seek to be served; and because of its nature and extent, and because the enormous amount of capital needed to make practical investments tends to create monopolies, the business of gas transportation is a public business in interstate trade, over which congress has never legislated, and to permit complainant to carry out its said attempt and intent to monopolize the natural gas of the state and transport it away without regulation by the state laws, over and across the state's highways, without the state's consent, would be to devote public property to private and exclusive use, against the principles of the Constitution of this state and the United States, and deprive the intending purchasers of natural gas in this state from all supply whatsoever."

There are other allegations of the effect of contemplated acts of the complainants upon the gas supply of the state, and there are admissions that pipe lines are the only practical means of transportation; but this it is alleged, is due to its cheapness as compared with other means of transportation, considering the price of gas as a fuel, as compared with other fuel products and the transportation of gas from other fields. And it is set forth that the highways of the state are open to the transportation of gas by any means which do not "make a permanent appropriation of any part of the highways by placing a plant in the same."

It is further alleged that in order to supply the cities of the state with gas, lines are continually being extended, and that there are several

Sec. 5. The laying, constructing, building, and maintaining a gas pipe or lines for the transportation or transmission of natural gas along, over, under, across, or through the highways, roads, bridges, streets, or alleys in this state, or of any county, city, municipal corporation, or any other private or public premises within this state, is hereby declared an additional burden upon said highway, bridge, road, street, or alley, and any other private or public premises, may only be done when the right is granted by express charter from

other pipe lines which are seeking to carry on business in the state in the same manner as desired by complainant, and if the right exist in complainant, it exists in all other foreign corporations, and if exercised, lines will be extended, as one part of the field becomes exhausted, to other parts of the field, and the lines supplying the cities of the state will also be extended in like manner and effect, and a speedy destruction of the supply of the gas in the state will result.

It is admitted that there are maintained and operated in the state natural gas pipe lines; but it is alleged that they are in daily use for the transportation of gas within the state. And it is further admitted that they in many instances, and often at great length, run over, along, and across the highways of the state, and "are operated without hurt, hindrance, damage, or inconvenience to the traveling public or to abutting property owners." But it is averred that "they were laid and are operated according to the laws in force at the time, and pursuant to the laws of the state."

Appellant admits that it is his duty to execute the laws of the state, and that it is his intention to enforce chapter 67 of the Session Laws of 1907 and 1908, and the acts amendatory and supplementary thereto "in so far as the same must or should be done by litigation in which the state is interested," but that his duties rest solely upon himself, and are not controlled by others, and that he intends to prevent solely by actions in competent courts the laying, constructing, and operating of gas pipe lines in, on, under, across, or along the highways of the state by complainant or by any other person not authorized so to do by the laws of the state. He denies the acts of force charged against him, or that he proposes to use force. The other denials and admissions it is not neccessary to set out. A dissolution of the injunction is prayed.

The cases were consolidated, as we have said, and submitted on the bills and the answers, "to the end that an immediate determination thereof and final decree therein" might be obtained.

A final decree was entered, declaring that the statute referred to "is unreasonable, unconstitutional, invalid, and void, and of no force or effect whatever," and a perpetual injunction was awarded against its enforcement.

the state, and shall not be constructed, maintained, or operated until all damages to adjacent owners are ascertained and paid as provided by law.

Sec. 6. All pipe lines for the transportation or transmission of natural gas in this state shall be laid under the direction and inspection of proper persons skilled in such business, to be designated by the chief mining inspector for such duty, and the expenses of such inspection and supervision shall be borne and paid for by the parties laying and constructing such pipe lines for the transportation or transmission of natural gas.

The basis of the decree of the court was that expressed in its opinion ruling upon the demurrers: to wit, that the statute of Oklahoma was prohibitive of interstate commerce in natural gas, and in consequence was a violation of the commerce clause of the Constitution of the United States, and that being, as the court said, its dominant purpose, it would, if enforced against complainants, "invade their rights as guarantied by the 14th Amendment of the National Constitution" and also the Constitution of the state. 172 Fed. 545.

These conclusions are contested, and it is asserted that the statute's "ruling principle is conservation, not commerce; that the due process clause is the single issue." And due process, it is urged, is not violated, because the statute is not a taking of property, but a regulation of it under the police power of the state. The provisions of the act, it is further insisted, are but exercise of the police power to conserve the natural resources of the state, and as means to that end the right of eminent domain is forbidden to foreign corporations engaged in transporting gas from the state, and the use of the highways of the state confined to pipe lines operated by domestic corporations, in order that gas may be transmitted only between points within the state. And such exercise of power, it is contended, does not regulate interstate commerce, but only affects it indirectly.

A paradox is seemingly presented. Interstate commerce in natural gas is absolutely prevented,—prohibited, in effect,—for we think it is undoubted that pipe lines are the only practical means of gas transportation, and to prohibit interstate commerce is more than to indirectly affect it. Every provision of the statute is directed to such result. Pipe line construction is confined to corporations organized under the laws of the state, and the condition of their incorporation is that they shall only transmit gas between points in the state, and shall not transport to or deliver to corporations or persons engaged in transporting or furnishing gas to points outside of the state. The right of eminent domain is given alone to such corporations, and the use of the highway is confined to them; and that there be no element of control over them omitted, a violation of the statute is punished by a forfeiture of charters and of property. Nor can a new corporation be formed if even one of its stockholders was a stockholder of an offending corporation.

Sec. 7. No pipe line for the transportation or transmission of natural gas shall be subjected to a greater pressure than 300 pounds to the square inch, except for the purpose of testing such lines, and gas pumps shall not be used on any gas pipe line for the transportation or transmission of natural gas, or used on or in any gas well within this state.

Sec. 8. Any corporation granted the right under the provisions of this act to exercise the right of eminent domain, or use the highways of this state to

To such stringent subjection foreign corporations could not be brought, so they are absolutely excluded from the state by the following provision: "Sec. 3. Foreign corporations formed for the purpose of, or engaged in the business of, transporting or transmitting natural gas by means of pipe lines, shall never be licensed or permitted to conduct such business within this state."

The statute presents no embarrassing questions of interpretation. It was manifestly enacted in the confident belief that the state had the power to confine commerce in natural gas between points within the state, and all of the rights conferred on domestic corporations, all of the rights denied to foreign corporations, were means to such end. And the state having such power, it is contended, if its exercise affects interstate commerce, it affects such commerce only incidentally. In other words, affects it only, as it is contended, by the exertion of lawful rights, and only because it cannot acquire the means for its exercise.

The appellant makes a broader contention. The right to conserve, or rather, the right to reserve, the resources of the state for the use of the inhabitants of the state, present and future, is broadly asserted. "The ruling principle of the law," counsel say, "is conservation, not commerce." It is true the means adopted to secure conservation is more insistently brought forward than the right of conservation, and the power of the state over its corporations and over its highways and its right to give or withhold eminent domain is many times put forward in the argument and illustrated by the citation of many cases. It cannot but be observed that these rights need not the support of one another. If the right of conservation be as complete as contended, it could be secured by simple prohibitions or penalties; if the power over highways and eminent domain be as absolute as asserted, it will have to be given effect, no matter for what purpose exercised. We are therefore admonished at the very start in the discussion of the importance of the questions presented and the power which the states may exert against one another, even accepting the concession of appellant that congress may break down the isolation by granting the right not only to take private property, but to subject the highways of the state, against the consent of the state, to the uses of interstate commerce. With full appreciation of the importance of the questions involved, we pass to their consideration.

construct or maintain a gas pipe line or lines for the transportation or transmission of natural gas to points within this state, which shall transport or transmit any natural gas to a point outside of or beyond this state, or shall connect with or attempt to connect with or threaten to connect with any gas pipe line furnishing, transporting, or transmitting gas to a point outside of or beyond this state, shall by each or all of said acts forfeit all right granted it or them by the charter from this state, and said forfeiture shall extend back

As to conservation, appellant says that "the case narrows itself to the single question of whether, in any event, a state has the right to conserve its natural resources; and, second, has it the right to preserve a common supply for the equal use of all those who may by law resort to it."

The second question is not presented in the case. The provisions of the statute are not directed against waste. They are directed against any use of the gas except in the state. The right of the state "to preserve the common supply for the equal use of all" owners is not denied by appellees. We put the question out of consideration, therefore, except incidentally, and concede the right of the state to preserve the supply of gas, as we shall hereafter set forth.

The extent of power which the second question implies a state possesses challenges serious inquiry. The natural resources of a state may be other than natural gas; for example, may be timber and coal and iron and other metals; but it is contended that the right of conservation extends to these, and the broad statement of the first question is qualified in the argument by the properties of natural gas and the limitation of its supply. This, it is contended, gives a range to the police power of the state which otherwise it would not possess. And such power, as we understand the further contention to be, may determine not only the conservation of the resources of the state, but as to what class of persons may use them, as dependent upon their transportation in state, rather than in interstate commerce. The contention is discussed at length and variously illustrated. Indeed, analogies are adduced of limitations upon the use of property by virtue of the police power under conditions which invoke its exercise for the advancement of the general welfare. We select for review from the cases brought forward, those nearest to our inquiry, which are Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. Ed. 729, 20 Sup. Ct. Rep. 576, 20 Mor. Min. Rep. 466; Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, *ante*, 337, 31 Sup. Ct. Rep. 337; Hudson County Water Co. v. McCarter, 209 U. S. 349, 52 L. Ed. 828, 28 Sup. Ct. Rep. 529, 14 A. & E. Ann. Cas. 560.

Ohio Oil Co. v. Indiana was a writ of error to the Supreme Court of Indiana to review a judgment of that court which sustained a statute which prohibited any one having the control or possession of any natural

to the time of the commission of said act or said acts in violation of this act; and such act or acts shall of themselves work a forfeiture of any and all rights of any and every kind and character which may be or may have been granted by the state for the transportation or transmission of natural gas within this state, and all the property of said corporation and all the property at any time belonging to said corporation, at any time used in the construction, maintaining, or operation of said gas pipe line or lines, shall, in due course of law, be forfeited to and be taken into the possession of the state through its

gas or oil well to permit the gas or oil therefrom to escape into the open air, and restrained the oil company from violating the statute. Against the statute was urged the rights of property assured by the 14th Amendment of the Constitution of the United States. The case is a valuable one and clearly announces the right of an owner to the soil beneath it, and the relation of his rights to all other owners of the surface of the soil. The right of taking the gas, it was said, was common to all owners of the surface, and because of such common right in all landowners, an unlimited use (against a wasteful use the statute was directed) by any it was competent for the state to prohibit. This limitation upon the surface owners of property was justified by the peculiar character of gas and oil, they having the power of self-transmission, and that therefore to preserve an equal right in all surface owners there could not be an unlimited right in any. Gas and oil were likened to, not made identical with, animals *ferae naturae,* and, like such animals were subject to appropriation by the owners of the soil, but also, like them, did not become property until reduced to actual possession.

But an important distinction was pointed out. In things *ferae naturae,* it was observed, all were endowed with the power of reducing them to possession and exclusive property. In the case of natural gas, only the surface proprietors had such power and the distinction, it was said, marked the difference in the extent of the state's control. "In the one, as the public are the owners, everyone may be absolutely prevented from seeking to reduce to possession. No devesting of private property, under such a condition, can be conceived, because the public are the owners, and the enactment by the state of a law as to the public ownership is but the discharge of the governmental trust resting in the state as to property of that character. Geer v. Connecticut, 161 U. S. 519, 40 L. Ed. 793, 16 Sup. Ct. Rep. 600. On the other hand, as to gas and oil, the surface proprietors within the gas field all have the right to reduce to possession the gas and oil beneath. They could not be absolutely deprived of this right which belongs to them without a taking of private property." And this right, it was further said, was coequal in all of the owners of the surface, and that the power of the state could be exerted "for the purpose of protecting all the collective owners, by securing a just distribution, to arise from the enjoyment by them of their privilege

proper officer, and in said action there shall be a right to the state of the appointment of a receiver, either before or after the judgment, to be exercised at the option of the state, and the officer taking possession of said property shall immediately disconnect said pipe line or lines at a proper point in this state from any pipe line or lines going out of or beyond the state. And said property shall be sold as directed by the court having jurisdiction of said proceedings, and the proceeds of said sale shall be applied, first to the payment of

to reduce to possession, and to reach the like end by preventing waste." And further characterizing the statute, it was said, viewed as one to prevent the waste of the common property of the surface owners, it protected their property, not devested them of it. And special emphasis was given to this conclusion by the comment that, to assert that the right of the surface owner to take was, under the 14th Amendment, a right to waste, was "to say that one common owner may devest all the others of their rights without wrongdoing; but the lawmaking power cannot protect all the owners in their enjoyment without violating the Constitution of the United States."

The case, therefore, is an authority against, not in support of, the contention of the appellant in the case at bar.

The statute of Indiana was directed against waste of the gas, and was sustained because it protected the use of all the surface owners against the waste of any. The statute was one of true conservation, securing the rights of property, not impairing them. Its purpose was to secure to the common owners of the gas a proportionate acquisition of it,—a reduction to possession and property,—not to take away any right of use or disposition after it had thus become property. It was sustained because such was its purpose; and we said that the surface owners of the soil, owners of the gas as well, could not be deprived of the right to reduce it to possession without the taking of private property. It surely cannot need argument to show that if they could not be deprived of the right to reduce the gas to possession, they could not be deprived of any right which attached to it when in possession.

The Oklahoma statute far transcends the Indiana statute. It does what this court took pains to show that the Indiana statute did not do. It does not protect the rights of all surface owners against the abuses of any. It does not alone regulate the right of the reduction to possession of the gas, but, when the right is exercised, when the gas becomes property, takes from it the attributes of property,—the right to dispose of it; indeed, selects its market, to reserve it for future purchasers and use within the state, on the ground that the welfare of the state will thereby be subserved. The results of the contention repel its acceptance. Gas when reduced to possession, is a commodity; it belongs to the owner of the land; and, when reduced to possession, is his individual property, subject

the cost of such proceeding, and the remainder, if any, paid into the school fund of the state, and said charter under which said act or acts were committed shall be revoked, and no charter for the transportation or transmission of natural gas shall ever be granted to any corporation having among its stockholders any person who was one of the stockholders of said corporation whose charter has or may have been forfeited as aforesaid, and if any such charter shall have been granted, and thereafter a person shall become a stock-

to sale by him, and may be a subject of intrastate commerce and interstate commerce. The statute of Oklahoma recognizes it to be a subject of intrastate commerce, but seeks to prohibit it from being the subject of interstate commerce, and this is the purpose of its conservation. In other words, the purpose of its conservation is in a sense commercial,—the business welfare of the state, as coal might be, or timber. Both of those products may be limited in amount, and the same consideration of the public welfare which would confine gas to the use of the inhabitants of a state would confine them to the inhabitants of the state. If the states have such power, a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals. And why may not the products of the field be brought within the principle? Thus enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequences does such power tend? If one state has it, all states have it; embargo may be retaliated by embargo, and commerce will be halted at state lines. And yet we have said that "in matters of foreign and interstate commerce there are no state lines." In such commerce, instead of the states, a new power appears and a new welfare,—a welfare which transcends that of any state. But rather let us say it is constituted of the welfare of all of the states, and that of each state is made the greater by a division of its resources, natural and created, with every other state, and those of every other state with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States. If there is to be a turning backward, it must be done by the authority of another instrumentality than a court.

The case of State ex rel. Corwin v. Indiana & O. Oil, Gas & Min. Co., 120 Ind. 575, 6 L. R. A. 579, 2 Inters. Com. Rep. 758, 22 N. E. 778, is pertinent here. A statute of Indiana was considered which made it unlawful to pipe or conduct gas from any point within the state to any point or place without the state. It was assailed on one side as a regulation of interstate commerce, and therefore void under the Constitution of the United States. It was defended on the other hand, as a provision for the exercise of the right of eminent domain, confining it to those engaged in state business, denying it to those engaged in interstate business; and, further, as imposing restrictions on foreign corporations.

holder thereof who was one of the stockholders of the corporation whose charter has been or may have been forfeited, as herein provided, the charter of said corporation, one of whose stockholders is as last named, shall therefore be forfeited and revoked. Provided, that any person who may be denied the right to become a stockholder as above prescribed may be granted the right to become such stockholder by the corporation commission, when such person

It will be observed, therefore, the statute had, it may be assumed, the same inducement as the Oklahoma statute, and the same special justifications were urged in its defense. The court rejected the defenses, and decided that the statute was not a legitimate exercise of the police power, or the regulation of the right of eminent domain or of foreign corporations, but had the purpose "plainly and unmistakably manifested" to prohibit transportation of natural gas beyond the limits of the state; and that, this being its purpose, it was void as a regulation of interstate commerce. These propositions were announced: (1) Natural gas is as much a commodity as iron ore, coal, or petroleum or other products of the earth, and can be transported, bought, and sold as other products. (2) It is not a commercial product when it is in the earth, but becomes so when brought to the surface and placed in pipes for transportation. (3) If it can be kept within the state after it has become a commercial product, so may corn, wheat, lead, and iron. If laws can be enacted to prevent its transportation, "a complete annihilation of interstate commerce might result." And the court concluded: "We can find no tenable ground upon which the act can be sustained, and we are compelled to adjudge it invalid." The case was explicitly affirmed in Manufacturers' Gas & Oil Co. v. Indiana Natural Gas & Oil Co., 155 Ind. 545, 53 L. R. A. 134, 58 N. E. 706, 21 Mor. Min. Rep. 102.

The case is valuable because the court, through the same justice who wrote the opinion, distinguished between an exercise of the police power to regulate the taking of natural gas and its prohibition in interstate commerce.

Jamieson v. Indiana Natural Gas & Oil Co., 128 Ind. 555, 12 L. R. A. 652, 3 Inters. Com. Rep. 613, 28 N. E. 76, sustained a statute which prohibited the taking of gas under a greater pressure than 300 pounds to the square inch. The court said that natural gas "is, on doubt, so far a commercial commodity that this state cannot prohibit its transportation to another state by direct legislation," citing State ex rel. Corwin v. Indiana & O. Oil, Gas & Min. Co., *supra*. The court said further: "If it can be taken from the well and transported to another state under a safe pressure, the state cannot prohibit its transportation, nor can the state establish one standard of pressure for its own citizens and another standard for the citizens of other states." The court, therefore, discern-

shows to such commission that he was not a party to the former violation of this act.

Sec. 9. No pipe lines for the transportation or transmission of natural gas shall be laid upon private or public property when the purpose of such line is to transport or transmit gas for sale to the public until the same is properly inspected as provided in this act; and before any gas pipe line company shall furnish or sell gas to the public, it shall

ing in the statute no discrimination and no prohibition, but only a regulation universal in its application, and justified by the nature of the gas, and which allowed its transportation to other states, decided that there was no restriction or burden upon interstate commerce.

Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, *ante*, 337, 31 Sup. Ct. Rep. 337, is to the same effect as Ohio Oil Co. v. Indiana. Its similarity to the latter case was pointed out. Indeed, they can be said to be identical in principle. In the one case oil and gas, in the other mineral water and gas, were commingled beneath the surface of the earth, and capable of movement and common ownership. In the one case the right was asserted to waste the gas to secure the oil, which was the more valuable of the two; in the other case the right was asserted to waste the water to secure the gas, as the more valuable of the two. In both cases there was a statute forbidding the waste. Speaking of the purpose of the statute in Lindsley v. Natural Carbonic Gas Co. it was said: "It is to prevent or avoid the injury and waste suggested that the statute was adopted. It is not the first of its type. One in principle quite like it was considered by this court in Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. Ed. 729, 20 Sup. Ct. Rep. 576, 20 Mor. Min. Rep. 466." The statute was sustained upon the reasoning of that case.

Hudson County Water Co. v. McCarter is urged, we have seen, on our attention. A statute of the State of New Jersey was involved, which made it unlawful for any person or corporation to transport or carry through pipes the waters of any fresh-water lake, river, etc., into any other state, for use therein. Two propositions may be said to be the foundation of the decision of the court below sustaining the statute: (1) "The fresh-water lakes, ponds, brooks, and rivers, and the waters flowing therein, constitute an important part of the natural advantages of" the state, "upon the faith of which its population has multiplied in numbers and increased in material and moral welfare. The regulation of the use and disposal of such waters, therefore, if it be within the powers of the state, is among the most important objects of government." (2) "The common law recognizes no right in the riparian owner, as such, to divert water from the stream in order to make merchandise of it, nor any right to transport any portion of the water from the stream to a distance for the use of others." [70 N. J. Eq. 701, 709, 14 L. R. A. (N. S.)

secure from the inspector a certificate showing that said line is laid and constructed in accordance with this act, and under the inspection of the proper officer; provided that nothing in this act shall be construed to prevent persons drilling for oil and gas from laying surface lines to transport or transmit gas to wells which are being drilled within this state, and further provided, that factories in this state may transport or transmit gas through pipe lines for their own use for factories located wholly within this state, upon securing the

197, 118 Am. St. Rep. 754, 65 Atl. 489, 10 A. & E. Ann. Cas. 116.] It was further declared that the common law authorized the acquisition of water "only by riparian owners, and for purposes narrowly limited. Not that the ownership is common and public." And the contention was rejected that the title of the individual riparian owner was to the water itself,—the fluid considered as a commodity,—and exclusive against the public and against all persons excepting other riparian owners.

It is clear that neither of these propositions will support the contentions of the appellant in the case at bar. Nor does any principle announced upon the review of the case here, though the power of the state to enact the statute was put "upon a broader ground than that which was emphasized below." The police power of the state was discussed and the difficulty expressed of fixing "boundary stones between" it and the right of private property which was asserted in the case. There were few decisions, it was said, that were very much in point. But certain principles were expressed, of which Geer v. Connecticut, 161 U. S. 519, 40 L. Ed. 793, 16 Sup. Ct. Rep. 600, was considered as furnishing an illustration, and Kansas v. Colorado, 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552, and Georgia v. Tennessee Copper Co., 206 U. S. 230, 51 L. Ed. 1038, 27 Sup. Ct. Rep. 618, 11 A. & E. Ann. Cas. 488, some suggestions.

That principle was the "interest of the public of a state to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use." And this principle was emphasized as the one determining the case, and the opinion expressed that it was "quite beyond any rational view of riparian rights that an agreement of no matter what private owners could sanction the diversion of an important stream outside the boundaries of the state in which it flows. The private right to appropriate is subject not only to the rights of lower owners, but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health."

It is hardly necessary to say that there was no purpose in the case to take from property its uses and commercial rights, or to assimilate a flowing river and the welfare which was interested in its preservation to the regulation of gas wells, or to take from the gas when reduced to pos-

right of way from the state over or along the highways and from property owners to their lands.

Sec. 10. That no person, firm, or association or corporation shall ever be permitted to transmit or transport natural gas by pipe lines in this state, or in this state construct or operate a pipe line for the transmission of natural gas, except such persons, firms, associations, or corporations be incorporated as in this act provided, except as in § 9 of

session the attributes of property decided to belong to it in Ohio Oil Co. v. Indiana, and recognized in Lindsley v. Natural Carbonic Gas Co. Indeed, pains were taken to put out of consideration a material measure of the benefits of a great river to a state. And surely we need not pause to point out the difference between such a river, flowing upon the suface of the earth, and such a substance as gas, seeping invisible through sands beneath the surface.

We have reviewed the cases at some length, as they demonstrate the unsoundness of the contention of appellant based upon the right to conserve (we use this word in the sense appellant uses it) the resources of the state, and that the statute finds no justification in such purpose for its interference with private property or its restraint upon interstate commerce. At this late day it is not necessary to cite cases to show that the right to engage in interstate commerce is not the gift of a state, and that it cannot be regulated or restrained by a state, or that a state cannot exclude from its limits a corporation engaged in such commerce. To attain these unauthorized ends is the purpose of the Oklahoma statute. The state, through the statute, seeks in every way to accomplish these ends, and all the powers that a state is conceived to possess are exerted and all the limitations upon such powers are attempted to be circumvented. Corporate persons are more subject to control than natural persons. The business is therefore confined to the former, and foreign corporations are excluded from the state. Lest they might enter by the superior power of the Constitution of the United States, the use of the highways is forbidden to them and the right of eminent domain is withheld from them, and the prohibitive strength which these provisions are supposed to carry is exhibited in the fact that the boundary of the state is a highway. If it cannot be passed without the consent of the state, commerce to and from the state is impossible. The situation is not underestimated by appellant, and he says: "If the appellees had the right of way they might engage in interstate commerce, but their desire to engage in interstate commerce is a different thing from the means open to them to procure a right of way." And it is further said, that "the confusion of the right to engage in interstate commerce with the power to forcibly secure a right of way is the basis of appellees' case."

this act, and provided further that all persons, firms, corporations, associations, and institutions now doing the business of transportation or transmission [of] natural gas in this state and otherwise complying with this act are hereby permitted to incorporate under the provisions of this act within ten days after the passage and approval of the same.

Sec. 11. All acts and parts of acts in conflict with this act are hereby repealed.

Sec. 12. An existing emergency is

There is here and there a suggestion that the state not having granted such right, the alternative is a grant of it by congress. But this overlooks the affirmative force of the interstate commerce clause of the Constitution. The inaction of congress is a declaration of freedom from state interference with the transportation of articles of legitimate interstate commerce, and this has been the answer of the courts to contentions like those made in the case at bar. State ex rel. Corwin v. Indiana & O. Oil, Gas & Min. Co., 120 Ind. 575, 6 L. R. A. 579, 2 Inters. Com. Rep. 758, 22 N. E. 778; Benedict v. Columbus Constr. Co., 49 N. J. Eq. 23, 23 Atl. 485, and also in Haskell v. Cowham [April 7, 1911], United States Circuit Court of Appeals, Eighth Circuit. In the latter case the Oklahoma statute was under review, and in response to the same contentions which are here presented, these propositions were announced, with citation of cases:

"No state by the exercise of, or by the refusal to exercise, any or all of its powers, may prevent or unreasonably burden interstate commerce within its borders in any sound article thereof.

"No state by the exercise of, or by the refusal to exercise, any or all of its powers, may substantially discriminate against or directly regulate interstate commerce or the right to carry it on."

The power of the State of Oklahoma over highways is much discussed by appellant and appellees; the appellant contending for a power practically absolute, as exercised under the statute, making the highways impassable barriers to the pipe lines of appellees. The appellees contend for a more modified and limited right in the state, one not extending beyond an easement of public passage, subject, therefore, to certain rights in the abutting owners, which rights can be transferred, and further contend that even if the power of the state be not so limited, it cannot be exercised to discriminate against interstate commerce.

The rights of abutting owners we will not discuss, nor the rights derived from them by appellees, except to say that whatever rights they had, they conveyed to appellees, and against them there is no necessity of resorting to the exercise of eminent domain. We place our decision on the character and purpose of the Oklahoma statute. The state, as we have seen, grants the use of the highways to domestic corporations engaged in intrastate transportation of natural gas, giving such corporations even the right to the longitudinal use of the highways. It denies to appellees the lesser right to pass under them or over them, notwithstanding it is

hereby declared by the legislature for the preservation of the public peace, health, and safety of the state.

Sec. 13. This act shall take effect from and after its passage and approval, as provided by law.

Approved December 21, 1907.

conceded in the pleadings that the greater use given to domestic corporations is no obstruction to them. This discrimination is beyond the power of the state to make. As said by the circuit court of appeals in the eighth circuit, no state can by action or inaction prevent, unreasonably burden, discriminate against, or directly regulate, interstate commerce or the right to carry it on. And in all of these inhibited particulars the statute of Oklahoma offends.

And we repeat again, there is no question in the case of the regulating power of the state over the natural gas within its borders. The appellees concede the power, and, replying to the argument of appellant based on the intention of appellees to erect large pumps to increase the natural rock pressure of the gas, appellees say: "Kansas by legislative enactment forbids the use of artificial apparatus to increase the natural flow from gas wells. Chapter 312, Laws of Kansas, 1909, p. 520. To this act the Kansas Natural Gas Company has no objection."

Decree affirmed.

Mr. Justice HOLMES, Mr. Justice LURTON, and Mr. Justice HUGHES dissent.

NOTE.

On the power of a state to regulate the transportation of natural gas from the state, see notes to Ohio Oil Co. v. Indiana, 20 Mor. Min. Rep. 466, and Manufacturers Gas & Oil Company et al. v. Indiana Natural Gas & Oil Company, 21 Mor. Min. Rep. 102. As to the police power of the state to prevent waste of gas and oil, see Freund, Police Power, § 422.

NOME & SINOOK CO. v. SNYDER.

[Circuit Court of Appeals, Ninth Circuit, May 22, 1911.]

187 Fed. 385.

1. **Mines—Placer Location—Number of Locators.**

Five persons may, by means of proper association, make valid location of one hundred acres in one placer claim, but only where each acquires an interest not to exceed twenty acres.

2. **Same—Invalid Location.**

A placer location of one hundred acres, made by an association of five persons under an agreement whereby two of the parties were to receive only nominal interests and the others in unequal shares, is held void, and the ground declared unappropriated mineral land subject to location by others.

In Error to the District Court of the United States for the Second Division of the District of Alaska.

Ejectment by William Snyder against the Nome & Sinook Company, Judgment for plaintiff. Defendant brings error. Affirmed.

For plaintiff in error—F. E. Fuller, O. D. Cochran, W. A. Gilmore, Metson, Drew & Mackenzie and E. H. Ryan.

For defendant in error—James W. Bell.

On or about June 22, 1909, the defendant filed an application in the United States land office at Nome, Alaska, for patent to mining premises known as the "Snyder Group No. 3," designated as "Survey No. 739," and comprising the Maybel, Loyal Fraction, Snyder, and Troy Bench Fraction claims. To this application the plaintiff filed an adverse, and in due time commenced this action in ejectment to determine its alleged superior and paramount right to the premises. The plaintiff alleges that it is now, and ever since the 24th day of June, 1899, it and its predecessors have been, the owners, seised of the legal estate in fee and entitled to the possession of certain mining premises, consisting of "that certain mining claim commonly known as and called the Pocahontas, Querropas, Ratapan, Seneca, Ticonderoga (also called the Pocahontas)," bounded as in the complaint described. The complaint then sets forth in effect that prior to the date last named the premises were vacant, unoccupied, and unappropriated public mineral lands; that on or about said date

NOTE.

Excessive location of mining claims, | see note to Zimmerman v. Funchion, *post*, p. 437.

William A. Kjellmann, Amaso Spring, Jr., Arthur E. Southward, Jafet Lindeberg, and Alex Jernes associated themselves together under the firm name of Nome Mining & Development Company, Limited, and, being qualified to locate, appropriate, and hold mining claims, "entered upon said premises and duly located and appropriated the same as a placer mining claim"; that they made discovery of gold-bearing mineral within the limits, marked the boundaries, and on February 27, 1899, caused to be recorded a notice of location of said claim; that thereafter by sundry mesne conveyances the plaintiff became the purchaser and owner, and during each year since the date of location plaintiff and its grantors have performed labor and improvements of not less than $100 for the benefit and development thereof. Further than this, appropriate facts are set forth showing that the action is properly instituted in support of plaintiff's adverse claim to defendant's application for a patent. The defendant answered, and the cause went to trial before a jury. At the close of plaintiff's evidence a nonsuit was granted upon the motion of the defendant. This appeal is from the action of the court in that regard.

WOLVERTON, District Judge (after stating the facts as above). It is shown by the testimony of Jafet Lindeberg that he, together with Kjellmann, Spring, Southward, and Jernes, formed a partnership called the "Nome Mining & Development Company, Limited, to get mining claims around the vicinity of Nome, Penny River, and outside of that," and that the claim sought to be established by plaintiff is one of the claims located by this partnership. The notice shows that the "undersigned" have located 100 acres of placer mining ground described as Pocahontas, Querropas, Ratapan, Seneca, and Ticonderoga. Then follows a description which runs around all the claims. The concluding part of the notice is as follows:

"Located 24th day of January, A. D. 1899, by Nome Mining & Development Co., Ltd., Amasa Spring, Jr., General Manager."

Attached to the notice is a plat showing the Ticonderoga on the west, next east the Seneca, and east of that the Ratapan, all in square form. The Querropas, is still east of the latter, in rectangular form, Each of these are described as containing 20 acres. East of the Querropas, along its northern extremity, is located lot 2, and north of that lot 1, each of which contains 10 acres and is designated the Pocahontas, all containing 100 acres. E. Wallace Smith, who was the agent of the company and was left in charge after the alleged location was made, testified that the locations were not made out as individual locations, nor was each location made separate, but were made in a group.

Generally, it may be said the proof shows that there was a marking of this claim at the time so that it could be readily traced upon the ground. Some of the stakes, however, were planted in snow and

others in ice upon a stream. Later, in 1907, one Gibson, made a survey of the claim, retracing quite closely the boundary of the original location, identifying a number of the original stakes, but by no means all of them. This witness relates that he panned out quite a lot of gold in the spring of 1899 at the mouth of Center Creek. It does not appear upon what part of the claim this panning was done. Indeed, it is only by inference that we may know that it was done on the claim at all. Lindeberg says that he discovered gold on the claim in 1899, and panned out some in 1898, and that some leases were given to people to rock on the claim on both sides of Snake River, and especially in a little gully running through Pocahontas No. 2, and that some "Laps" had a privilege of mining down below Pocahontas No. 1, who reported a great find in the gulch in 1899. This is as near as the evidence discloses the location of the discovery of any gold or other minerals on the claim anywhere. No evidence was offered to show that assessment work had been done upon the claim at any time subsequent to its location, or that any mining was done thereon since by plaintiff or its predecessors.

The location of defendant's group of claims was made on and subsequent to July 7, 1900.

The principal ground upon which the nonsuit was granted is that the alleged location by the Nome Mining & Development Company, Limited, was void because it was made in pursuance of a scheme by which one person would acquire more area than is allowed by law under one location, and therefore a fraud upon the government.

The strong contention of the plaintiff is that by showing discovery and location it made a *prima facie* case which ought to have been submitted to the jury. This would be true, waiving mention of the assessment work; but there must be a valid location. Of this we will inquire.

The plaintiff corporation is the successor to the Nome Mining & Development Company, Limited, by mesne conveyances, and claims under it and by virtue of the location that it made. The agreement by which the locating company was formed is before the court. It evidences a joint-stock company, formed by Kjellmann, Spring, Southward, Lindeberg, and Jernes; the stock consisting of 4,000 shares, of which Kjellmann was entitled to 2,050, Spring 1,334, Southward, 614, Lindeberg 1, and Jernes 1, the object being to mine and develop the Cape Nome mining district, Alaska. There was no incorporation of the company; the agreement alone forming the association. Now, this company as a company, not by the members in their individual capacity, made one location of 100 acres; for the notice so states, and the evidence is in confirmation thereof. Under the law an individual

cannot acquire more than 20 acres of mining ground by one location; but an association of persons may make joint location of not to exceed 160 acres.

Section 2330 of the Revised Statutes (U. S. Comp. St. 1901, p. 1432) provides that:

"Legal subdivisions of forty acres may be subdivided into ten-acre tracts; and two or more persons, or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof; but no location of a placer claim, made after the ninth day of July, eighteen hundred and seventy, shall exceed one hundred and sixty acres for any one person, or association of persons, which location shall conform to the United States surveys."

And section 2331 (page 1432):

"* * * All placer mining claims located after the tenth day of May, eighteen hundred and seventy-two, shall conform as near as practicable with the United States system of public land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant."

We are to inquire how and in what manner the association of persons may make location of more than 20 acres. In analyzing these statutes, Mr. Lindley observes that the unit or individual location is 20 acres, and that not more than 160 acres may be embraced within one location by an association of persons, of which there must be at least eight. Lindley on Mines, § 448, p. 790. The Supreme Court of Colorado entertains a like view, for it says in Kirk et al. v. Meldrum, 28 Colo. 453, 460, 65 Pac. 633, 636:

"The construction of the act of congress with respect to placers has universally been that the act makes provision for such locations, and prescribes the area which may be located; in other words, the area is limited to 20 acres to each locator, and that a number of individuals may locate a claim in common, not exceeding 20 acres to each person, and not exceeding 160 acres in any one claim."

The Land Department, by a published regulation, has so construed section 2331:

"That from and after May 10, 1872, no location made by an individual can exceed 20 acres, and no location made by an association of individuals can exceed 160 acres, which location of 160 acres cannot be made by a less number than eight bona fide locators."

So it is said in Morrison's Mining Rights (13th Ed.) 215:

"It requires eight bona fide locators to lawfully claim 160 acres."

See, also, Costigan on Mining Law, 173.

This court, speaking through Morrow, Circuit Judge, has given its sanction to such interpretation in Cook v. Klonos, 164 Fed. 529, 537, 90 C. C. A. 403, 411, in language both pointed and explicit as follows:

"The prohibition contained in section 2331 against the location of 'more than twenty acres for each individual claimant' is direct and posi-

tive, and limits the amount of ground that any one claimant may appropriate, either individually or in association claim, at the time of the location."

It follows, therefore, with exact logic, that five persons may by means of proper association make valid location of 100 acres in one claim, so that it did not include more than 20 acres to each individual. This does not mean that while the five may, by associating themselves together, locate 100 acres in one claim, one or two of the five can acquire by such location substantially all of the claim, leaving the others with proportionately a very small or nominal interest therein, but that each must acquire an interest not to exceed 20 acres.

Any scheme or device entered into whereby one individual is to acquire more than that amount or proportion in area constitutes a fraud upon the law, and consequently a fraud upon the government, from which the title is to be acquired, and any location made in pursuance of such scheme or device is without legal support and void, The proposition seems to be well established. Mitchell v. Cline, 84 Cal. 409, 24 Pac. 164; Gird v. California Oil Co. (C. C.), 60 Fed. 532; Durant v. Corbin (C. C.), 94 Fed. 382; Cook v. Klonos, *supra.*

In the latter case the court says on this subject:

"The scheme of using the names of dummy locators in making the location of a mining claim for the purpose of securing a concealed interest in such claim appears to be contrary to the purpose of the statute; but when this scheme is used to secure an interest in a claim for a single individual, not only concealed, but in excess of the limit of 20 acres, it is plainly in violation of the letter of the law, and when, as in this case, all the locators had knowledge of the concealed interest and were parties to the transaction, it renders the location void."

Now, in the case under review, the very articles of agreement put the claimant beyond the pale of the law, while the testimony establishes the illegality of the scheme beyond peradventure. The location, although made in the name of the association, two of the parties thereto were to have but a nominal interest in the claim, one less than one-fifth, one largely more than one-fifth, and one more than one-half, giving the latter, of course, more than 50 acres proportionately in the claim. So that, regardless of the discovery, regardless of the marking on the ground, or even the assessment work, the claim was void, and could not avail the locators in any stage. The location being void, the ground remained as if none had been made, and was unappropriated mineral land, subject to location by others. This is sufficient to dispose of the controversy, without passing specifically on the effect of failure to prove that the assessment had been regularly done, or other points made in the brief of counsel.

The judgment of the trial court will be affirmed.

CARNES v DALTON.

[Supreme Court of Oregon, June 14, 1910; on petition for rehearing, July 12, 1910.]

— Or. —, 110 Pac. 170.

1. **Waters and Water Courses—Appropriation—Use of Less Water than Entitled to.**

If one co-owner elects to take less than the quantity of water to which he is entitled, one who has the right to use the ditch to convey waters in excess of the quantity to which the owners thereof are entitled is not in a position to complain.

2. **Judgments—Decree Affects Parties Only.**

Decree in action to determine interests in ditch affects only parties to that action, and owners of other interests are not bound thereby.

3. **Waters and Water Courses—Use of Ditch—Right of Parties.**

One entitled to use ditch only for purpose of conveying surface waters has no right to occasion injury to owners of ditch.

4. **Same—Surplus Waters.**

Owners of ditch are under no obligation to see there is water in canal to supply one whose right is only to use ditch to convey surplus waters.

5. **Same—Cotenants—Liability for Maintenance.**

Each of several tenants in common of an irrigation ditch and dam is responsible in proportion to his interest therein for the maintenance and repair of the ditch, and in case of default of one or more the other has the right to make such repairs, for which the defaulting party becomes liable for his *pro rata*. But such failure does not justify a third party in making up the loss occasioned by the default by drawing off the water of the former.

6. **Same—Cotenants of Ditch—One May Sue for Injury.**

One of the co-owners of a company ditch has a right of action against one having the right to use the ditch for conveying surplus waters, who causes a depletion of the waters to the injury of such co-owner.

CASE NOTE.

Joinder of Parties in Action for Diversion of Water, Injury to Ditch, etc.

I. In General.

A. All Parties in Interest or Affected by Judgment.

Any person whose rights may be affected by an adjudication of priorities

7. Parties—Necessary in Action for Damages to Ditch.

In action by one co-owner of an irrigation ditch against a party diverting certain waters therefrom to his injury, the other co-owner is not a necessary party where there is no dispute as to the rights of the co-owners.

8. Same—Tenants in Common of Ditch—One May Sue for Injury.

One tenant in common of a ditch or water right may institute a suit for unlawful interference therein by another tenant.

9. Waters and Water Courses—Action to Determine Adverse Claims.

Where defendant insists upon the right to deplete the flow of water in a ditch and that his rights therein be adjudicated, an action is maintainable under B. & C. Comp., § 394, authorizing one claiming an interest adverse to plaintiff to be made a defendant.

Action to enjoin interference with diversion of water from a ditch or canal known as a company ditch. Judgment for defendant. Reversed and remanded.

This is a suit to enjoin defendant from interfering with the diversion of water by plaintiffs from a company ditch, leading from North Powder River in Baker County. This ditch or canal, known as the "company ditch," is about one-half mile in length from its source to the division boxes, one of which, known as the "Kelsey tap," conveys water to plaintiffs' premises, being used by them as tenants in common with Kelsey. The other, known as the "Dalton tap," carries water claimed by defendant, being owned by him in company with McPhee and others. The company ditch, to the point of distribution, is about 8 feet wide, and when used to its full capacity the water flowing therein is from 12 to 18 inches in depth. It is claimed, and the trial court finds, that the canal carries about 2200 inches of water. Its exact carrying capacity is immaterial, however, the quantity of water not being particularly involved, for it is admitted by the pleadings and unquestioned in the evidence,

is entitled to be made a party in an action to adjudge priorities. Nichols v. McIntosh, 19 Colo. 22, 32 Pac. 278 (1893).

In an action by certain water consumers to have the rights of all consumers determined, all the consumers interested must be made parties or their rights cannot be determined. O'Neil v. Ft. Lyon Canal Co., 39 Colo. 489, 90 Pac. 849 (1907).

In action for the diversion of water, all parties interested in the relief demanded and whose rights will be affected by the judgment, may be joined as plaintiffs, and the same rule applies to defendants. Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728 (1909).

All parties who claim adversely to the plaintiff or who are necessary to a complete determination of the controversy are proper parties defendant, although the plaintiff may not have been injured by them. Whited v Corwin (Or.), 105 Pac. 396 (1909).

B. Parties Having No Interest.

One having no interest in the ownership of water is neither a proper or necessary party in action to determine ownership. Hackett v. Larimer & Weld Reservoir Co., *post*, p. 224.

that plaintiffs have the first right as against defendant to one-eighth of whatever the company canal will carry, and it seems to be admitted that this quantity is represented by the amount that will flow through a box one foot square (no pressure being given) placed in the side of the canal as hereinafter described. Assuming this to be correct, it will be seen that the carrying capacity of the company ditch is much less than claimed, but, as indicated, such feature cannot affect the result herein.

Plaintiffs are the owners and in possession of the S. W. ¼ of the S. W. ¼ of section 32, township 6 S., range 39 E. W. M., and the N. ½ of the N. W. ¼ of section 5, and 10 acres situated in the N. W. ¼ of the N. E. ¼ of section 5, adjoining the same, all in township 7 S., range 39 E. W. M., containing 120 acres of agricultural lands, of which 90 acres are cultivated to orchards, garden, etc., such tract having, since the year 1886, been irrigated by means of water conveyed through the company ditch mentioned, in the right to which plaintiffs, together with L. S. Kelsey, are tenants in common, and prior in time and right to defendant.

The defendant owns the W. ½ of section 3; the E. ½ of the S. E. ¼, and the S. ½ of the N. E. ¼ of section 4; the S. E. ¼ of the S. E. ¼ of section 10; the W. ½ of the N. E. ¼ of section 2; and the N. W. ¼ of section 10, all in township 7 S., range 39 E. W. M., in Baker county, Or., of which he has about 200 acres in alfalfa and other crops; and his title to which it is claimed relates back to the year 1880.

Prior to 1888 the plaintiffs' predecessors in interest and L. S. Kelsey were the exclusive owners of the company ditch, right of way and water right through it. During that year they entered into an agreement with the defendant, his co-owners and their predecessors in interest, whereby

C. Not All Riparian Owners.

Bill by one riparian proprietor to enjoin a certain party from diverting water need not join as parties all the riparian owners. Rincon Water & Power Co. v. Anaheim Union Water Co., 115 Fed. 543 (1902).

D. Higher Appropriators.

Appropriators of water of stream above the lands of the parties to the action are not necessary parties in action to enjoin diversion by defendants. Beck v. Bono, *post*, p. 222.

E. Intermediate Owners.

Intermediate owners who have made diversions of the water and whose rights will be affected by the decree are necessary parties. Bliss v. Grayson, 24 Nev. 422, 56 Pac. 231 (1899), affirmed 25 Nev. 329, 59 Pac. 888 (1900).

F. Immaterial if Party Plaintiff or Defendant.

In an equitable action to determine the rights of all parties on a stream, it is immaterial whether the parties are plaintiffs or defendants if they are all before the court. Williams v. Altnow, 51 Or. 275, 95 Pac. 200 (1908).

II. Owners in Severalty.

The owners of different water rights, neither of which had any interest in the land, water or ditch of the others, cannot unite in an action against one who

the ditch was enlarged to double its capacity—that is, to eight feet in width—and through which it was understood defendant and his co-owners should thereafter have the right to convey water appropriated by them, which right it then was, and still is, understood and recognized, as being subsequent in time and inferior in right to Kelsey and Wilson, the latter being the predecessor in interest of plaintiffs; and that Kelsey and Wilson, and their successors in interest, should at all times, when the supply of water was inadequate for the accommodation of all parties, have the first right to the use thereof through such ditch. As to the ditch, it was recognized that this defendant and his co-owners should own one-half, and Kelsey and Wilson one-half, the division of the waters flowing therein to be at a point from which defendant and his co-owners should extend a canal in the direction of and to their premises, opposite to which the ditch of Kelsey and Wilson continued in the direction of and to their premises, as before the enlargement of the upper and company portion thereof.

A dispute arose between Kelsey and his co-owners, resulting in the institution of a suit by one of the parties (McPhee) against Kelsey. This cause was tried and thereafter appealed to this court (McPhee v. Kelsey, 44 Or. 193, 74 Pac. 401, 75 Pac. 713), where a decree was entered modifying the judgment of the trial court. Subsequently this decree was vacated, and the cause remanded for a new trial (45 Or. 290, 78 Pac. 224), after which further testimony was taken, findings made, and a decree entered, the purport of which was to hold that the plaintiffs therein, McPhee, Dalton, et al., were the owners of an undivided one-half interest in the canal to the point of divergence of the extended ditches of the respective parties, and that Kelsey was the owner of the right to the remaining one-half; and it was further decreed that at the point of

diverts the stream further up. Foreman v. Boyle, 88 Cal. 290, 26 Pac. 94 (1891).

Settlers upon public lands along a stream who have acquired rights to appropriate and use waters from such stream as a common source of supply, each owning separately his land and water right, in his individual capacity may join in an action to enjoin interference with such rights; they having a sufficient common interest. Frost v. Alturas Water Co., 11 Idaho 294, 81 Pac. 996 (1905).

Those whose lands are flooded by reason of obstructions, etc., may join in action for injunction, but not for damages. Palmer v. Waddell, 22 Kan. 352 (1879).

The owners of several mills erected upon and using the same stream to operate their mills may join in an action to restrain a stranger from taking the water, to their damage. Ballou v. Inhabitants of Hopkinton, 70 Mass. (4 Gray) 324 (1855).

Where several landowners are each injured by the maintenance of a dam they may join in action for injunction against the same. Turner v. Hart, 71 Mich. 128, 38 N. W. 890, 15 Am. St. Rep. 243 (1888).

Injunction against obstruction in stream may be brought by owners of

divergence mentioned, the canal being eight feet wide, a box should be placed, and so arranged that a body of water four feet in width should flow into the McPhee-Dalton ditch, and a like body of water flow into the Kelsey ditch. From this no appeal was taken, and the decree became final. In that suit neither these plaintiffs nor their predecessors in interest were parties. The plaintiffs' grantors, however, received their supply of water from year to year through the opening in the box, placed there by order of the court for Kelsey's interest. About one year prior to the commencement of this suit plaintiffs purchased the real property and water right mentioned, under the conveyance of which it appears that plaintiffs own what is termed throughout the proceedings a "one foot" in width interest, meaning, by this unusual and indefinite term, the quantity of water represented by one-eighth of the width of the canal, or an interest in a quantity equal to one-eighth of the entire flow of water capable of being conducted through same. This quantity, plaintiffs decided, for the purpose of convenience in measuring, to take from a point about ten feet above the division gate, or about the point where Kelsey and Dalton diverted water; for which purpose they inserted a box one foot square, turning the water around the head gate into the ditch, used for a considerable distance in common by them and Kelsey, through which water was conveyed to the full carrying capacity of the box, weir measurement. In order to get the required amount through the box, it was necessary that the water be raised at the point where it flowed through the Dalton and Kelsey division box. Kelsey asserting the right to raise the water, for the purpose of irrigating his lands, closed his and defendant's head gate. In this manner plaintiffs received the quantity desired for irrigation. There was not, at the time, sufficient water flowing from the main channel of the creek into the company ditch to supply

lands higher up the stream. Gillespie v. Forest, 18 Hun (N. Y.) 110 (1879).

Where the injuries are separate and distinct, the owners in severalty of adjoining tracts cannot join as plaintiffs. Hellams v. Switzer, 24 S. C. 39 (1885).

III. Tenants in Common.

One cotenant may sue for injury to ditch held by tenants in common. Carnes v. Dalton, principal case; Odiorne v. Lyford, 9 N. H. 502, 32 Am. Dec. 387 (1838).

Where there is no dispute as to the rights of the various cotenants it is not necessary that they all be made parties in action for injury to ditch. Carnes v. Dalton, principal case.

One tenant in common may sue for an infringement of his right without joining his cotenants. Union Mill & Mining Co. v. Dangberg, 81 Fed. 73 (1897).

One tenant in common of a dam, flume or irrigating ditch may maintain action against diversion of any of the water to which either he or his cotenants are entitled. Rogers v. Pitt, 89 Fed. 420 (1898).

In action to restrain diversion of water one cotenant may sue without joining the others. Miller & Lux v. Rickey, 127 Fed. 573 (1904).

all parties, due principally to the dam in the creek at the head of the canal having partly washed away. Dalton removed one of the four-foot boards, placed there by Kelsey, from his head gate, which, with the limited quantity of water then in the ditch, depleted the flow in plaintiffs' box to such an extent that it could not reach their premises, resulting in this suit. A hearing was had before a referee, and upon the testimony taken by him the learned trial court found that, as a legal effect of the acts disclosed by the evidence, Dalton was in no wise interfering with plaintiffs' rights; that there was an abundant supply of water in the river for all parties, and that plaintiffs could have had an adequate quantity thereof by turning the same into the ditch; that such injury as was occasioned was the result of wrongful acts on the part of Kelsey, not a party to the suit, and not by reason of any claim or doings of defendant, resulting in a dismissal of the suit, and in this appeal.

For appellant—M. L. Olmstead, and Olmsted & Strayer.

For respondents—Leroy Lomax, and Lomax & Anderson.

KING, J. (after stating the facts). The facts above stated are practically conceded by the pleadings, as well as by defendant's testimony, only the legal effect thereof being in question. Defendant admits removing the four-foot board from his head gate, when there was no surplus water in the company ditch, occasioning thereby the depletion complained of, and at the same time expressly recognizes that plaintiffs' water right through the ditch is prior in time and superior in right to the claim of defendant and his co-owners. The only point, then, with which we are concerned, and as to which there is any difficulty, is whether plaintiffs had a right to elect to take the water through the box at the point mentioned. There can be no question, under the pleadings and admissions of defendant, as to plaintiffs being entitled to the quantity, when needed, capable of flowing through the box provided at his point of diversion. The conceded one-eighth interest could not, without pressure, flow through a box one foot square. But if plaintiffs elect to take less than

One tenant in common may preserve the entire establishment held in common, and this doctrine is applicable where the common estate is a water right so long as the tenant in common has both the necessity for the use and actually uses the water for a beneficial purpose. Cache La Poudre Co. v. Larimer & Weld Reservoir Co., 25 Colo. 144, 53, 318, 71 Am. St. Rep. 123 (1898), affirming 8 Colo. App. 237, 45 Pac. 525 (1896); Meagher v. Hardenbrook, 11 Mont. 385, 28 Pac. 451 (1891).

IV. Beneficial Owners.

In a suit to enjoin water commissioners from diverting certain waters for the benefit of subsequent appropriators, the subsequent appropriators, being the real parties in interest, are necessary

the quantity to which they may be entitled, it is obvious that defendant is not in position to complain. Furthermore this quantity appears to be adequate for plaintiffs' purposes. It will be remembered that plaintiffs were not parties to the former suit, and are in no wise bound thereby, and their interests, so far as here involved, must be considered as if such suit had never been instituted. It is argued that the suit in hand was properly dismissed, not only for the alleged reason that there was no interference or pretended interference with plaintiffs' rights, but on account of the injury complained of being the result of wrongful acts by Kelsey. It is true that Kelsey was enjoined by the former decree from either removing boards from, or obstructing the flow through Dalton's half of the head gate, unless otherwise ordered by the court, provision for which was reserved in the decree. If, then, Kelsey violated this decree and closed the head gate, that is a matter with which Dalton and Kelsey only were concerned, and not these plaintiffs.

Defendant and his co-owners, it is conceded, were entitled to use the ditch only for the purpose of conveying surplus waters, from which it follows that if there were no surplus therein, they had no right to remove the board which occasioned the injury to plaintiffs. It was certainly not incumbent upon plaintiffs, whose rights were first and superior to defendant, to see that sufficient water was flowing in the canal to supply defendant's needs, for, their rights being first, it necessarily devolved upon defendant to see that the desired surplus was in the canal, and it became his duty, subject to the qualifications to follow, to provide therefor, before lowering his head gate to let such surplus pass through to his premises. Under the agreement with plaintiffs' predecessors in interest, plaintiffs were and are tenants in common in the company ditch and dam at its source with Dalton and others, succeeding to the original interests, making each responsible in proportion to his interest therein, for the maintenance and repair of the dam and ditch, and in case of default of one or more the other has a right to make such repairs, for which the defaulting party becomes liable for his *pro rata;* but such failure by plaintiffs, if any, did not justify defendant, under the law, in making up the loss thus occasioned, by drawing off the water from plaintiffs' division

parties to the action. Squires v. Livesey, 36 Colo. 302, 85 Pac. 181 (1906).

In an action to restrain irrigation officers from closing certain head gates, brought by certain consumers of the water, the other consumers whose rights are affected thereby, being the real parties in interest, must be joined as defendants. McLean v. Farmers' High Line Canal & Reservoir Co., 44 Colo. 184, 98 Pac. 16 (1908).

V. Necessity of Possession.

An owner not in possession can bring action only for injury to the reversion by the diversion of water from a stream. Rathbone v. McConnell, 20 Barb. (N. Y.) 311 (1855).

box. See Moss v. Rose, 27 Or. 595, 41 Pac. 666, 50 Am. St. Rep. 743. When, therefore, he removed the board, causing the depletion complained of, without making provision for an additional supply of water in the ditch to make up the deficiency, he necessarily invaded plaintiffs' rights to their injury, of which they were entitled to complain. This was as much an encroachment upon plaintiffs' rights as if he had tapped plaintiffs' ditch below the point of diversion. Had the company ditch been partitioned, so that plaintiffs' so-called "one foot" in width of water would have flowed separately and apart from the waters in the adjacent canal, it would certainly not be urged that Dalton would have the right, in the event of a shortage, to open this partition; this, however, was not the method pursued. The waters claimed by each were allowed to mingle, and were divided at the point above indicated. The division box, therefore, constituted the partition, and it was incumbent upon defendant, in the use of his surplus, so to adjust it as not to interfere with plaintiffs' use, so long as plaintiffs' use and manner of diversion were reasonable.

The method pursued by plaintiffs appears to have been for the purpose of determining when they were receiving their quota of water, for the court had ruled (although not as against them, but as against defendant and his co-owners) that Kelsey was entitled to the quantity that would flow through the four-foot aperture. When, therefore, it is disclosed that the quantity was of the same depth across the eight-foot box, and within the manner designated by the commissioner appointed by the court, it becomes clear that the one-half awarded Kelsey, and the one foot, or one-eighth, owned by plaintiffs, would not have flowed through this opening without an additional obstruction being placed in defendant's aperture at the head gate. It is accordingly immaterial, so far as defendant is concerned, whether such obstruction was placed there for the purpose of increasing the flow on Kelsey's side of the box or for the purpose of running the additional quantity through the Carnes box, eight or ten feet above it. In fact the latter method would seem to be the more convenient manner of distributing the water, for when the supply was adequate for the demands of all, it would be left of uniform

Action for the diversion of water from a stream must be brought by the party in possession, and it is only necessary to prove the right of possession. Hathbone v. McConnell, 20 Barb. (N. Y.) 311 (1855).

VI. Landlord and Tenant.

The owner of real estate and the tenant of a quarry thereon may join in an action for the flooding of the quarry, as the grievance is common to both. The injury was committed at the same time and by the same act and each is interested in the same relief, although their interests in the judgment may be unequal. American Bell Glass Co. v. Nicoson, 34 Ind. App. 643, 73 N. E. 625 (1905).

depth across the entire width of the head gate, and require only such additional flow through the ditch above as would furnish the increased quantity necessary to fill the Carnes box.

The question then arises whether Kelsey was a necessary party. There is no dispute between Kelsey and plaintiffs as to the quantity to which plaintiffs are entitled. It is conceded by all, including Kelsey, that plaintiffs were entitled to one-eighth of the entire flow, and Kelsey, insisting only that it be diverted to plaintiffs in the manner adopted, in no way attempted to interfere with plaintiffs' use, but, on the other hand, endeavored to aid them in acquiring the supply required. He might properly have been made a party, but it cannot, under the record, be held that he is a necessary party, for, as indicated, a determination of the rights between plaintiffs and Kelsey is not essential to the solution of the difficulty between Dalton and the Carnes. B. & C. Comp. § 41. The only interference that plaintiffs were subjected to was by Dalton, hence it was not required that he make any one else a party defendant by reason of the trespass complained of. It is well settled that one tenant in common in a ditch or water right may institute a suit for unlawful interference therein by another tenant (Moss v. Rose, 27 Or. 595, 41 Pac. 666, 50 Am. St. Rep. 743), and, as stated by the court in Gould v. Stafford, 77 Cal. at page 67, 18 Pac. at page 879: "Evidence that persons other than defendant also diverted water from the stream was admissible only on the issue as to the amount of damages. If defendant's diversion of water was wrongful, he could have no defense as against the injunction in the fact that others were guilty of a similar wrong, and evidence offered to prove the latter fact would be irrelevant and inadmissible. And as plaintiff waived all claim to damages (except nominal), we think that it was error to admit evidence of diversions of water by third parties." The same case was later before that supreme court on appeal. Gould v. Stafford, 91 Cal. 146, 27 Pac. 543; Id., 101 Cal. 32, 35 Pac. 429. At the retrials the pleadings were amended and the cause heard under new issues, and while the results differ, the court adheres to the rule first announced on this point. To the same effect, Wiel, Water Rights (2d Ed.)

Lessor and lessee may join in action to enjoin the flowage of land, for their interest is the same in preventing the injury. Andrews v. Wekenman, 144 Mich. 199, 107 N. W. 870 (1906).

A lessor and lessee cannot join in action for damages for the flowage of land, as the measure of recovery to each is different. Andrews v. Wekenman, 144 Mich. 199, 107 N. W. 870 (1906).

VII. Joint Tort Feasors.

A concert of action is necessary before tort feasors can be joined as defendants. The general rule as to tort feasors being joint or several applies to actions affecting water rights. Aeyes v. Little Fork Gold Washing Water Co., 53 Cal. 724 (1879).

Several parties cannot be united as defendants in action for damages for the

§ 196; Lakeside Ditch Co. v. Crane, 80 Cal. 181, 186, 22 Pac. 76. See, also, note to Barnard v. Shirley, 41 L. R. A. 758, where authorities considering this principle are collated.

It is also argued that since defendant concedes plaintiffs' prior right, and manifests no intention of continuing the interruption, the suit cannot be maintained. But it is clearly established that he did insist upon the right to deplete the flow in the manner complained of, and in his answer prays that his rights therein be adjudicated, under which circumstances it is fully settled that a suit is maintainable. B. & C. Comp. § 394; Jones v. Conn., 39 Or. 30, 47, 64 Pac. 855, 65 Pac. 1068, 87 Am. St. Rep. 634, 54 L. R. A. 630; Hough v. Porter, 51 Or. 318, 372, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728; Whited v. Cavin (Or.), 105 Pac. 396, 401. The same point was urged in the briefs, and at the oral argument, but not deemed important in Seaweard v. Pacific Live Stock Co., 49 Or. 157, 88 Pac. 963, and Williams v. Altnow, 51 Or. 275, 95 Pac. 200, 97 Pac. 539.

It follows that the decree dismissing the suit must be reversed, and one entered enjoining defendant from interfering with the flow of one-eighth the carrying capacity of the company ditch to and through the aperture provided by plaintiffs for that purpose. And it appearing important that the rights of the parties hereto should be adjudicated, in the benefits of which each must share, and that defendant was probably acting within what he believed to be his rights, the costs allowed defendant in the circuit court will not be disturbed; plaintiffs to have their costs on appeal.

EAKIN, J., having at circuit court tried the former suit involving this ditch, took no part in this decision.

On Petition for Rehearing.

In the petition for rehearing our attention is called to McPhee v. Kelsey, 44 Or. 194, 74 Pac. 401, 75 Pac. 713, where the ditch here involved was in controversy, the petition averring it was there held that L. S. Kelsey and the successor of the elder Wilson "were the owners, or had

diversion of water where they do not act in concert and there is no collusion, arrangement or understanding between them. Evans v. Ross (Cal.), 8 Pac. 88 (1885).

VIII. Several Tort Feasors.

In an equitable action to establish right to water, several persons diverting the same may be joined as defendants although they act as individuals, and not jointly or by any common right. Union Milling & Mining Co. v. Dangberg, 81 Fed. 73 (1897).

Where the defendants claim from the same source, divert from the same ditch, and make claims of right, whether severally or united, to the use of the water, which affect the rights of plaintiff thereto, they are properly joined in an action

the superior right to the amount of water which would fill the present ditch to one-half its capacity; that this respondent and his associates were entitled to the use of the other half when there was sufficient water to fill the ditch, and the decree of the circuit court which is in evidence in this cause is to the same effect"; and that it has been decreed and conceded in all former litigation that Kelsey and Wilson (plaintiffs' predecessors in interest) were entitled jointly to one-half of the ditch; and that it has never been held that Kelsey alone was entitled to one-half interest. For these alleged reasons it is argued we are in error in holding, in effect, that plaintiffs' one-eighth interest, when taken together with Kelsey's decreed rights, results in a right in defendant and others interested with him to but three-eighths of the quantity capable of flowing through the company ditch. If in this counsel were correct, there could be no question as to the soundness of their position, but, as stated in our former opinion, the final decree in McPhee v. Kelsey, reported in 44 Or. 194, 74 Pac. 401, 75 Pac. 713, was vacated and a new hearing ordered (45 Or. 290, 78 Pac. 224), after which further testimony was taken, and in the decree entered thereunder the following language appears: "That L. S. Kelsey is entitled to the prior and exclusive right to the full amount of the water in said ditch to the extent of said four-foot ditch in width; that plaintiffs James Dalton and P. L. Smith (being the successors in interest jointly with George Neil of the rights of said McPhee, Smith, Tanner, and York in the said enlargement of said ditch) are entitled to the amount of water carried by such enlargement, subject to Kelsey's rights above defined." It is also conceded that four feet in width, as here used, means a one-half interest, and in all the former litigation respecting this ditch it is so treated.

When viewed in connection with the contention and proof in the above case we fail to see any ambiguity in the language quoted from the decree. It decrees as clearly as is possible to do so that, as between Kelsey, on the one hand, and Dalton and Smith, on the other, Kelsey alone is the prior owner, and entitled as a first right to a quantity of water equal to one-half of the carrying capacity of the company ditch, and the part

to quiet title. Senior v. Anderson, 115 Cal. 496, 47 Pac. 454 (1896).

Where no claim for joint damages is made, a single suit may be maintained against a number of defendants for diverting water, although they are not acting in concert or as joint tort feasors. Montecito Valley Water Co. v. City of Santa Barbara, 144 Cal. 578, 77 Pac. 1113 (1904).

IX. Licensee of Defendant.

In an action to regulate and fix the rights of the various parties to the waters of a stream, one taking part of the waters by the permission or license of one of the defendants, may be joined as a defendant. Van Horn v. Clark, 56 N. J. Eq. 476, 40 Atl. 203, 23 L. R. A. 685 (1898).

of the decree following the above excerpt enjoins Dalton and his then co-owner, Smith, from any interference therewith. This decree was offered in evidence by the plaintiff, and for obvious reasons must be considered in determining the rights of the parties hereto, but plaintiffs cannot in any way be held bound thereby, for neither they nor any of their predecessors in interest were parties to that suit. This rule, although elementary appears to have been overlooked by the petitioners.

The pleadings in this case concede, and the proofs fully establish, that the plaintiffs, Samuel and W. A. Carnes, have the first right to a quantity of water equal to one-eighth of the carrying capacity of the ditch involved; from which it necessarily follows, when taken in connection with the adjudication in the McPhee-Kelsey suit, that defendant Dalton cannot interfere with plaintiffs' first right to the use of a quantity of water diverted through the plaintiffs' division box, not exceeding a quantity equal to one-eighth of the supply capable of being diverted through the company ditch. As the former decree gives to Kelsey as against Dalton and his associates in the former suit four-eighths of the carrying capacity of the ditch, it must follow that when Kelsey and these plaintiffs are each using their respective water rights to the full extent allowed, there must be less than four-eighths left for the other owners. This would leave the condition such that when plaintiffs are using no water, then as between Dalton et al., on the one hand, and Kelsey on the other, each could, when the water is needed, use one-half thereof. That is to say the former decree, as between Kelsey and Dalton, is still effective. Kelsey being first entitled to a "four-foot" supply, after which, when not needed by the Carnes, Dalton et al. may receive, when available, a like quantity, but when required by the Carnes, Dalton's supply must be reduced in proportion to the carrying capacity of the Carnes' foot-square division box, whether one-eighth or less.

In connection with the foregoing, reference is made to our statement in the narrative of facts, to the effect that Kelsey and Wilson were recognized as having one-half interest, and the defendant and his co-owners one-half. This statement, however, had reference only to the original

One across whose land a part of the ditch in question runs, and who tapped it at the request of another, is a proper party to join with the latter in an action wherein the right to the ditch is in controversy. Bowman v. Bowman, 35 Or. 279, 57 Pac. 546 (1899).

X. Statutory Actions.

In action under the Colorado statute to determine priorities, those parties whose rights have been theretofore determined and decreed both as to time and quantity need not be joined as parties. In re Priorities of Water Rights in District No. 12, 33 Colo. 270, 80 Pac. 891 (1905).

Under the Maine statute providing for the ascertainment by commissioners, etc., of the damage to lands from flowage, all the owners of a dam must be joined.

understanding between the parties, and not to the decree as finally entered. It is too obvious to admit of discussion that not what we may now discover as the original understanding between the litigants, but the decree as finally entered in the former suit, is binding upon this court.

In the petition much discussion is entered into as to the alleged injustice in holding to the effect that defendant cannot divert water from the river into the company ditch or in any way interfere with or use the division head gate; that the division gate must forever remain closed for the benefit of Kelsey and these plaintiffs, and defendant must accordingly lose his entire water rights, etc., etc. But there is nothing in the opinion from which such conclusions may be deduced. We merely held in substance, and so stated, that defendant should be enjoined from interfering with plaintiffs' prior right to the use of the quantity of water capable of being run through the Carnes box one foot square, placed at their point of diversion a few feet above the Dalton-Kelsey division box; such quantity not to exceed one-eighth of the carrying capacity of the company ditch. If then there is at any time only sufficient in the ditch to supply the quantity awarded plaintiffs, then as between the plaintiffs and defendant the plaintiffs are entitled to close defendant's side of the division-box in such manner as may prove essential to the diversion of such quantity through the Carnes division box. Again, when there is only sufficient to furnish Kelsey his four-eighths and the Carnes the quantity awarded them, the Dalton side of the division box may, for that purpose, be closed entirely. But when all water capable of flowing through the company ditch, in excess of that required by either or both of the parties last named, is in the company ditch, the excess must be permitted to flow to defendant's premises, and the boards in the head gate may be removed or arranged in such manner, whether by defendant his employees, or others authorized so to do, as to permit such surplus to flow through the head gate.

We do not wish to be understood as adjudicating in this suit any controversy between Kelsey and this defendant, for example, as to what

Turner v. Whitehouse, 68 Me. 221 (1878).

Under the Montana code all parties who have diverted water from the same stream may be joined, and the court may settle all rights, but this provision is permissive, and does not compel the defendants to litigate their various rights in such an action. Sloan v. Byers, 37 Mont. 503, 97 Pac. 855 (1908).

One or more owners may sue for the flowage of their lands from a dam built without leave to build or continue the same, under the Nebraska statute, and need not negative the existence of other property also overflowed. Pierce Mill Co. v. Koltermann, 27 Neb. 722, 42 N. W. 877 (1889).

Under statute providing that where the question is one of a common or general interest of many persons, one or more may sue for the benefit of all, the

lands and where Kelsey may irrigate, etc. We intend only to recognize their relative rights as expressed in the decree in evidence between them, and the rights thereunder are here considered merely in connection with, and only in so far as may be essential to a full understanding and determination of the controversy in hand. Nor can we at this time determine the relative rights of the plaintiffs between themselves, or as between plaintiffs and Dalton's co-owners, or as against Kelsey, the reasons for which are obvious. Indeed it is unfortunate that all were not made parties either to the former suit or to the one before us, where issues could, and should, have been framed with the view to a determination (during the lifetime of the witnesses) of the relative rights of all concerned, but in the absence of such presentation we are powerless to afford a complete remedy for the many complexities possible to arise between all those interested.

It is argued that it is unnecessary, in order to furnish plaintiffs the water awarded them, to obstruct the flow through defendant's division box. When the company ditch is used to its full carrying capacity this position is tenable, but to concede this contention, when the supply is inadequate for all, would be to question the law of gravitation, for the findings in the former suit recite that "the bottom of the Dalton box is 4 feet 4 inches wide, and has a rapid fall for a distance of 10 feet above the box and the same through the box"; hence when there is only sufficient in the ditch to supply plaintiffs, or to supply plaintiffs and Kelsey, as the case may be, and defendant's head gate is left open, it must necessarily follow that a part of the water would flow through Dalton's head gate, depleting plaintiff's supply proportionately. The contention on this point overlooks the adjudicated as well as conceded fact that plaintiffs and Kelsey are prior appropriators, and their actual needs, to the extent of four-eighths formerly decreed Kelsey and that here awarded plaintiffs, must first be supplied before any water may flow to defendant, and whatever may then be left to defendant, whether much or little, becomes immaterial. It may prove more practicable to run the quantity going to Kelsey and these plaintiffs, as tenants in common, through

owners of water rights along a stream have a common and general interest in preventing the diversion of water from the common supply. The number of persons interested is not fixed by the statute and the common interest of four persons is sufficient to maintain the action. Climax Specialty Co. v. Senea Button Co., 54 Misc. 152, 103 N. Y. Supp. 822 (1907).

Under the Utah statutes, parties claiming rights adverse to plaintiff or diverting water from the same stream to his injury may be joined as defendants, although some of them reside out of the county where the suit is brought. Deseret Irrigation Co. v. McIntyre, 16 Utah 398, 52 Pac. 628 (1898).

Kelsey's side of the box, but if so it will necessitate a rearrangement of the company division head gate. This, if found necessary, may be directed by the trial court as before, through the aid of commissioners, appointed for the purpose.

We appreciate the suggested difficulty possible to arise in carrying out and making effective the decree when entered if all the parties involved and interested do not comply with the former decree, as well as the one here entered, but with that we have nothing to do. It is our function to interpret and not to administer the law. In this connection, however, it may not be improper to note that, as supplementary to the usual method of dealing with those who may refuse to comply with the decree in this class of cases, an adequate administrative system appears to have been provided in the Act of 1909. See Laws 1909, p. 319.

The petition for rehearing is denied.

BECK et al. v. BONO et al.

[Supreme Court of Washington, August 5, 1910.]

59 Wash. 479, 110 Pac. 13.

Waters and Water Courses—Pleading and Practice—Parties to Action to Enjoin Diversion.

Appropriators of waters of a stream above the land of parties to the action are not necessary parties to determine question of injunction from defendants wrongfully diverting waters to plaintiffs' damage.

Action to enjoin interference with water rights, for the establishment of such rights, and for damages for the illegal use of certain waters. Decree determining riparian rights of the parties and awarding damages to plaintiff. Affirmed.

For appellants—Brooks & Bartlett.

For appellees—Sharpstein & Sharpstein and Ed. C. Mills.

PER CURIAM. This was an action brought by the respondents, seeking to enjoin appellants from interfering with certain water rights claimed by the respondents, for the establishment of such rights, and for the damages for the illegal use of the waters of certain streams in Walla Walla County. The riparian rights of the parties to the action were determined by the court, and judgment was decreed in favor of the plaintiffs (respondents) against the defendants (appellants) for damages in the sum of four hundred dollars and costs.

The appellant in commencing his argument, says this cause is characterized in its inception by the unwarranted deprivation, through the interposition of the court, of the rights of the defendants to the use of any of the water of the Yellowhawk Creek on the Bono ten-acre tract, and of the use of the water from the Robinson ditch on any of their lands, and in its conclusion by an attempt to extort damages in an amount the existence of which is sought to be established rather by the enormity of the demand than by persuasion of the evidence. It was finally conceded by the plaintiffs and granted by the court that

As to necessary parties in action for diversion of water, injury to ditch, etc., see note to Carnes v. Dalton, *ante*, p. 207.

the defendants had a right to divert water from the Yellowhawk Creek along the route of the iron pipe line across the plaintiffs' lands and to a two-fifths interest in the Robinson ditch. As a result, much of the vital part of the action has been eliminated, leaving subsidiary and minor questions for determination and settlement. So that the questions brought here on appeal are simply moot questions, or at least affect only the merits of the case in so far as they bear upon the question of damages.

Contentions were made under the complaint concerning the lack of defendants' riparian rights, which were abandoned at the trial, and from the examination of the voluminous testimony in the case we think the award was, to say the least, as favorable to the appellants as they deserved. The only contention that can affect appellants' rights, so far as the judgment for damages is concerned, is that there is a defect of parties, because it is alleged by the appellants that there were appropriators of the waters of this creek above the land of the parties to this action. It is not necessary to make others parties to this action to determine whether the defendants should be enjoined from wrongfully diverting waters to the damage of plaintiffs. That is a question of proof. Under the allegations of the complaint, they were entitled to the injunction, and we think the proof sustained the allegations.

From a careful examination of all the testimony in the case, we are not inclined to disturb the findings of the court in reference to the amount of damages adjudged.

The judgment is affirmed.

HACKETT et al. v. LARIMER & WELD RESERVOIR COMPANY.

[Supreme Court of Colorado, June 6, 1910.]

48 Colo. 178, 109 Pac. 965.

1. **Parties—Necessary in Action for Diversion of Water.**

Where sole question was whether plaintiff or defendant owned certain waters, irrigation company having no interest in the ownership thereof was neither proper nor necessary party to the action.

2. **Same—Affected by Decree.**

Decree is not objectionable in enjoining defendants from interfering with head gates or interfering with superintendent of irrigation company in discharge of duties at certain times, for reason that irrigation company was not a party to the action.

3. **Pleading and Practice—Complaint—Diversion of Waters—Priority of Rights—Necessity of Allegation.**

In action to restrain defendants from diverting water belonging to plaintiff, no question of priority of appropriation being involved, priority of rights of the parties by appropriation need not be alleged.

4. **Waters and Water Courses—Commingling of Waters—No Rights Conferred by.**

The fact that waters of reservoir company and irrigation company were commingled, defendants having right to use certain of irrigation company's waters, does not invest defendants with right to take water which does not belong to them, nor does the neglect of duty of the irrigation company to distribute the commingled waters give such right.

5. **Pleading and Practice—Parties Only Bound by Allegations.**

Plaintiff is not bound by allegations in the pleadings in a suit for adjudication of water rights to which it was not a party, and plaintiff was not required to intervene therein.

6. **Judgments—Parties Only Bound by Decree.**

Plaintiff is not bound by decree fixing consumer's rights in action between him and irrigation company, to which it was not a party, and decree therein is no defense in action by plaintiff to restrain diversion.

7. **Waters and Water Courses—Commingling of Waters—Rights of Consumers.**

The commingling of two classes of water, to part of one of which defendant was entitled, gives him no right to divert that part in which he had no interest. Consumers of water supplied by irrigation company cannot complain of any use of canals or ditches granted by the latter or acquired by operation of law, which does not interfere with their rights.

8. **Same—Action to Enjoin Interference—Defenses.**

In action by reservoir company to restrain interference with its waters, it is no defense that a large volume of water existed at the source of supply available under another appropriation, to part of which, if so appropriated, defendants would be entitled.

Action to enjoin diversion and interference with flow of water in certain irrigating canal. Judgment for plaintiffs. Affirmed.

For plaintiffs—Thomas J. Leftwich, and Newton W. Crose.

For defendant—Rhodes, Temple & Foster.

GABBERT, J. Plaintiffs in error, in an action brought against them by the defendant in error, were enjoined from interfering with the flow of water in the canal of the Larimer & Weld Irrigation Company, which had been turned into that conduit by defendant in error from its reservoir. They were also enjoined from interfering with the head gates of the irrigation company, except upon the order of its superintendent, and from in any manner interfering with him in the discharge of his duties as such superintendent, while engaged in superintending the canal of the irrigation company during the flow of the water therein from the reservoir of the defendant in error. In considering the questions urged by counsel for plaintiffs in error in support of their contention that the judgment is erroneous, we shall refer to the parties as plaintiff and defendants, which was their relation in the court below.

The allegations of the complaint filed by plaintiff, so far as material to any question involved, were to the effect that it owned the Larimer & Weld Reservoir in which it stored water for the purposes of irrigation; that its stockholders owned lands lying under the Larimer & Weld Irrigation Company canal, and were entitled to water from the reservoir with which to irrigate their lands; that water turned from the reservoir entered this canal; that by contract it had acquired the right to run its stored water through this canal; that neither the Larimer & Weld Irrigation Company nor the defendants had any interest in the reservoir whatever, or the water stored therein; that while engaged in running water from its reservoir through the canal for distribution to its stockholders, defendants, acting in concert, had raised certain head gates along the canal and diverted the reservoir water flowing therein, to the volume of about twenty cubic feet per second of time, and were taking such water against the protest of plaintiff and its stockholders, and applying it to their own use. The issues thus tendered were found in favor of the plaintiff, and the judgment of which the defendants complain entered.

Clearly this judgment was correct, for the obvious reason that the testimony establishes that defendants were taking water belonging to the plaintiff and its stockholders, in which they, the defendants, had no right whatever, unless for some reason, urged upon our attention and not so far disclosed from the facts above narrated as found by the court based on the allegations of the complaint, it is erroneous.

As to joinder of parties in action for diversion of water or for injury to ditch, etc., see note to Carnes v. Dalton, *ante*, p. 207.

The defendants demurred to the complaint upon the ground that plaintiff had no legal capacity to sue, and that there was a defect and nonjoinder of parties plaintiff. This demurrer was overruled, and the same question was sought to be raised by answer by alleging that the Larimer & Weld Irrigation Company was a necessary party, without whose presence a complete determination of the controversy and an adjudication of the rights of the parties in the subject-matter thereof could not be had. The court disregarded this plea. It is urged that it should have been sustained for the reason that the defendants were not parties to the contract between the reservoir and irrigation companies, whereby the former acquired the right to conduct its water through the canal of the latter. It appears from the averments of the complaint, is undisputed by the testimony, and was found by the court, that the irrigation company had no interest in the reservoir water whatever. It was carried through the canal of the irrigation company under a contract between the two companies. The sole question was whether the plaintiff or the defendants owned the reservoir water which the defendants were diverting from the canal; hence, the controversy was narrowed to one between the plaintiff and defendants, did not concern any other party, and when that was settled between them, the rights in the subject-matter of controversy were completely adjudicated as between them. Consequently, the presence of the irrigation company as a party was not required. Clearly those who have no interest in the subject-matter of controversy involved in an action are neither proper nor necessary parties thereto.

It is also urged on behalf of defendants that the decree discloses the necessity for the presence of the irrigation company. This contention is based upon the provision in the decree to the effect that the defendants are enjoined from interfering with the head gates of the irrigation company except upon the consent or order of the superintendent of the latter, and from in any manner interfering with him in the discharge of his duties during such times as there is a flow of water in the canal of the irrigation company from plaintiff's reservoir.

The decree is not objectionable. Its purpose was to prevent the defendants from diverting the water of plaintiff company from the canal when it was being conducted by means of that channel. From the evidence it appears that under the contract between the reservoir and irrigation companies, the superintendent of the latter was to distribute the water turned into the canal by the former company. For these services the reservoir company paid the irrigation company, so that when its superintendent was engaged in distributing the water of the reservoir company he was acting for it, and it was eminently proper to enjoin defendants from interfering with him in the discharge of such duties. There

was no controversy between the two companies with respect to these matters.

A general demurrer to the complaint was also interposed and overruled. The many reasons advanced in support of the claim that the demurrer should have been sustained, when summarized, are simply to the effect that the complaint does not state facts from which it appears that it has acquired any priority to divert and store waters for irrigation purposes. As sustaining this proposition, Farmers' High Line C. & R. Co. v. Southworth, 13 Colo. 111, 21 Pac. 1028, 4 L. R. A. 767; Church v. Stillwell, 12 Colo. App. 43, 54 Pac. 395, and Farmers' Independent Ditch Co. v. Agricultural Ditch Co., 3 Colo. App. 255, 32 Pac. 722, are cited, in which cases it was held that a complaint which merely alleges a priority of an appropriation of water from a natural stream, without alleging the facts showing such prior appropriation, states a conclusion of law only, and upon demurrer is fatally defective. The question of priority is not involved in the case at bar. Its purpose was to restrain the defendants from diverting water belonging to or under the control of the plaintiff from the canal through which it was being conducted to its stockholders. The important ultimate question presented was, Did the defendants have any right to this water? No question of priority of appropriation as between the parties was involved, and hence the authorities cited are not in point.

All the defendants except Bushnell interposed a joint answer, in which, as a second defense, they allege that under certain agreements known as the Eaton contracts, dated April 24, 1878, they and their predecessors, from the date of such contracts, had acquired and enjoyed the undisputed right and use of sufficient water from the canal of the irrigation company to irrigate their lands; and also, under such contracts, were entitled to the exclusive control of their head gates placed in such canal. In support of this assertion they alleged, in substance, that April 24, 1878, they (the defendants) and their predecessors in interest were the owners of a ditch known as Irrigation Ditch No. 10, taking its supply of water from the Cache la Poudre River; that at this time Benjamin H. Eaton was engaged in constructing what was afterwards known as the Larimer & Weld Irrigation Company canal; that they entered into contracts with Eaton whereby they agreed to, and did, sell to him their right, title and interest in Ditch No. 10, in consideration of which Eaton covenanted and agreed that they, their heirs, and assigns, should have the perpetual right and privilege to take from the ditch he was constructing a sufficient quantity of water to irrigate their lands lying thereunder; that by virtue of these contracts he acquired the right of way and appropriations and priorities to use the water belonging to

Ditch No. 10, and merged the same into the canal of the irrigation company; that they have since diverted from the latter conduit and applied to their lands the water to which they were entitled by virtue of their contracts with Eaton, and that afterwards he sold to the Larimer & Weld Irrigation Company the canal by him constructed, subject to the provisions and terms of their contracts.

As a third defense these defendants alleged that the plaintiff company was organized by the stockholders and officers of the Larimer & Weld Irrigation Company, with the object of acquiring the right to carry the reservoir water through the canal of the irrigation company; that the plaintiff company acquired their rights with full knowledge that they were subject to the rights of the defendants, vested in them by virtue of the contracts set out in the second defense. They further alleged that the reservoir water turned into the canal had been commingled with that to which they were entitled in such manner as to render it impossible to determine what proportion was reservoir water and what proportion might lawfully be claimed by them; that the right of plaintiff to use the canal of the irrigation company as a conduit was acquired in 1891; that since such date they, the defendants, have enjoyed the free and uninterrupted use of water from the canal, with the knowledge of plaintiff, and without let or hindrance upon its part, and that by reason thereof the defendants and their predecessors have expended large sums of money in keeping their respective head gates in repair, maintaining their laterals, and in the application of water to their lands, whereby the equity of plaintiff, if it had any, has become stale; and that there has accrued to the defendants a prescriptive right to use of sufficient water from the canal to irrigate their lands.

By the fourth defense it was stated that in an action between the Colorado Milling & Elevator Company and the Larimer & Weld Irrigation Company, in which it was sought to adjudicate the rights of these parties to the use of water from the common source of supply, as well as the original owners of Ditch No. 10, and their successors in interest, the irrigation company, it was alleged in the answer of the latter that the volume of water necessary to irrigate the lands of the original owners of Ditch No. 10 and their successors was more than 19 2-3 cubic feet per second of time.

The second and third defenses of the defendant Bushnell, who filed a separate answer, are along the same lines as the second and third defenses of his codefendants. By his fourth defense he sought to interpose the defense of *res judicata,* upon allegations to the effect that in an action wherein he was plaintiff and the Larimer & Weld Irrigation Company was defendant, in which was involved the question of whether

or not he had a perpetual right to the use of water from the canal of the latter (Bushnell claiming he had, under one of the Eaton contracts), it was held that he had, and a decree entered accordingly. It is further alleged that the plaintiff company had knowledge of that action, and failed to intervene.

To each of these defenses demurrers were interposed and sustained. The defendants have assigned this as error. The judgment of the trial court in sustaining the demurrers was right, for the simple reason that neither of the defenses stated facts from which it appeared that the defendants had any interest in the reservoir water. Whatever rights they acquired under the Eaton contracts were limited to water belonging to the Larimer & Weld Irrigation Company. It does not appear from either of the defenses that this company had any interest in the reservoir water. The fact that the waters of the reservoir and canal companies might have been commingled as alleged gave the defendants no right to divert water which did not belong to them. It was the duty of the irrigation company, as stated by the trial judge in finally disposing of the case, to put in measuring weirs, so that the water flowing in the canal, when divert water which did not belong to them. It was the duty of the irrigation company to discharge its duty in this respect did not invest the defendants with the right to take water which did not belong to them. No facts were alleged from which it would appear that by the lapse of time the defendants had acquired any prescriptive right to the use of reservoir water, for the reason that it nowhere appears that they had diverted water belonging to the reservoir company. True, they say they have diverted water from the canal without let or hindrance on the part of the plaintiff company, but they do not charge that the water so diverted was the water of that company.

We are at a loss to understand how the answer of the irrigation company, set out in the fourth defense of the joint answer of the defendants, had any bearing whatever on the issues between the parties. The volume of water necessary to irrigate the lands of the defendants was not involved; and, aside from this suggestion, how could the averments in an answer of the irrigation company, in an action in which plaintiff company was not a party, affect the rights of the plaintiff? The fourth defense of the defendant Bushnell merely stated that there had been an action between himself and the irrigation company which involved his right to a perpetual use of the water from the canal of that company. The plaintiff company was not a party to this suit, nor was it under any obligation to intervene, although it may have had knowledge of its pendency. Bushnell's claim was not asserted to any water other than that which belonged to the irrigation company. The judgment in his case fixed no rights to the reservoir water. That was not involved.

It appears from the testimony that in 1862 several pioneer ranchmen settled on lands adjacent to the Cache la Poudre River, and diverted water from that stream through a ditch for the irrigation of their lands. This is the ditch heretofore referred to as Ditch No. 10. About 1878 the late Governor Eaton was engaged in constructing a canal which would also draw its supply of water from the Cache la Poudre River. He entered into contracts with the then owners of Ditch No. 10, whereby he acquired the latter and its priorities, in consideration of which he agreed that his vendors, their heirs and assigns should have the perpetual right to take from ditch No. 10 sufficient water to irrigate their lands. These are the contracts heretofore referred to, and defendants are either parties thereto or have succeeded to the rights thereby granted. The purchaser of Ditch No. 10 enlarged and merged it into the one he was then constructing. Later he sold the canal as enlarged to the Larimer & Weld Irrigation Company. It is claimed that the decree deprives the defendants of valuable rights acquired by virtue of the Eaton contracts. The several reasons urged in support of this contention, under several different heads, in the briefs of counsel, go to the one proposition that the decree repudiates, annuls, and divests the defendants of their rights under these contracts.

No question of that character is involved. The contracts gave no right whatever to water in the canal of the irrigation company except such as belonged to it. In the reservoir water it had no interest, and the judgment rendered simply enjoins the defendants from taking or interfering with the distribution of water belonging to or under the control of the plaintiff company, an entirely independent organization, neither party nor privy to the contracts.

It is urged that the decree is erroneous for the reason that it appears that at the time the acts complained of were committed there was commingled in the canal of the irrigation company with reservoir water, other waters belonging to the appropriations of the irrigation company, to which the defendants were entitled. Whatever the record may disclose in this respect is immaterial. The commingling of the two classes of water did not give the defendants any right to divert water in which they had no interest. In this connection it is urged that the contract between the two companies, and condemnation proceedings which appear to have been had, whereby the reservoir company secured the right to transport its water through the canal of the irrigation company, were of no binding force upon the defendants because they were not parties thereto, and that thereby they were deprived of a vested right to carry their water through the canal. It is unnecessary to determine this question. It is not claimed that the use of the canal by the reservoir

company at the time the defendants were diverting its water deprived them of carrying water to which they were entitled. It will be time enough to determine that question when, under material facts, it is presented for adjudication. The defendants cannot complain of any use of the canal granted by its owner or acquired by operation of law, which does not interfere with their rights.

It is also urged that the plaintiff company was not entitled to relief, for the reason that it did not come into court with clean hands. Under this head, we shall only consider one of the many propositions presented by counsel as supporting it, as all others have been disposed of in considering previous questions. It is claimed that, so far as disclosed by the evidence, there may have been in the river at the time defendants committed the acts complained of, a large volume of water pertaining to the appropriations of the irrigation company. Suppose there was; that did not entitle the defendants to take water which did not belong to them. The reservoir company was under no obligation, neither had it the right, to meddle with the appropriations belonging to the irrigation company. If the latter was not discharging its duty to the consumers under its canal, that did not authorize the defendants to commit a wrong against the plaintiff.

Many other propositions are urged upon our attention by counsel for defendants which it is not necessary to consider in detail. They have already been covered by what has been said, or relate to matters not involved, or to the reception of testimony which, whether relevant or not, did not prejudice the rights of the defendants, or a refusal to find on issues claimed to have been presented by the testimony, which were not material, or to findings of fact, whether correct or incorrect, which did not prejudice the defendants on the real question involved. That question, in a nutshell, was, To whom did the reservoir water belong? It unequivocally appears that it belonged to the plaintiff, and that the defendants had no interest therein whatever.

The judgment of the district court in so determining, and providing for the protection of plaintiff's rights as against the claims and acts of the defendants, will, therefore, stand affirmed.

Judgment affirmed.

STEELE, C. J., and BAILEY, J., concur.

McLEMORE v. EXPRESS OIL CO.

[Supreme Court of California, November 17, 1910.]

— Cal. —, 112 Pac. 59.

1. **Mining Claim—Necessity of Actual Possession.**

The rule that actual possession is not necessary to protect one's title to a claim held under a mining location applies only when the location has been completed by a discovery of valuable mineral.

2. **Oil Claim—Continued Operation Required.**

Under the application of the placer mining laws to the oil industry, the locator is protected in his possession only so long as he is with diligence prosecuting the labor of digging his well.

3. **Public Lands—Entry Complete without Possession.**

Under the homestead law, *possessio pedis* is not necessary to complete an entry.

4. **Public Lands—Right to Explore for Oil on Homestead.**

Land held under a homestead entry is not subject to the right of entry for the purpose of exploring for oil without positive proof that the land is more valuable for mineral than for agricultural purposes.

Department 2. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action in ejectment by C. A. McLemore against the Express Oil Company. Judgment for plaintiff. Defendant appeals. Affirmed.

For appellant—Frank H. Short and F. E. Cook.

For respondent—Larkins & Feemster.

HENSHAW, J. The action is in ejectment. Judgment passed for plaintiff, and from that judgment and from an order denying defendant's motion for a new trial it appeals. The controversy is between a claimant to government land under homestead entry, and a claimant to the same land under a purported mining location. An attempted location had been made by eight associates, defendant's grantors, under the placer mining laws. The valuable mineral sought to be discovered was oil. This was in January, 1906. A cabin was constructed upon the claim, its boundaries were marked, some bits of road built, and, in the language

NOTE.

As to the necessity of discovery under placer mining laws, see notes to Olive Land & Development Co. v. Olmstead et al., 20 Mor. Min. Rep. 700.

of appellant's brief, work had been done and improvements made upon the claim "far in excess of the requirements of the United States statutes with respect to assessment work and before any claim had been initiated by the plaintiff, they had expended in a direct and legitimate way many times over the amount required in the way of assessment work." Upon April 12, 1907, plaintiff first connected himself with the land by fulfilling all the requirements for entering it as a homestead. At that time, finds the court, no one of the defendants was in possession of the land.

Appellant's first contention is that the evidence of location, occupation, and possession of the ground as a mining claim by defendant was sufficient to exclude it from entry by plaintiff upon the 12th day of April, 1907, when his homestead entry was made. Undoubtedly appellant's contention in this respect would be correct if the location was valid and complete at the time of the homestead entry, since "actual possession of a mining claim held under a mining location is no more necessary for the protection of the title thereto, than it is for any other grant of the United States" (Belk v. Meagher, 104 U. S. 279, 26 L. Ed. 735), and the principle has become axiomatic that discovery and appropriation are the source of title to mining claims, and that assessment or development work is the condition of their continued possession (27 Cyc. 588). But this rule applies only when the location is valid and complete. And a location is valid and complete only when, after compliance with other requirements, a discovery of valuable mineral in place has been made. In the case of ordinary minerals, little or no difficulty has been experienced by the courts in this matter. In practice, the miner went upon the public domain, and, before he took the trouble to stake his claim and post and record his notice, he made discovery. The staking of the boundaries of the claim and the posting of notice followed such discovery. When, however, congress enacted that locations could and should be made of public lands containing petroleum or other mineral oils under the laws relating to placer mining claims (Act Feb. 11, 1897, c. 216, 29 Stat. 526 [U. S. Comp. St. 1901, p. 1434]), the courts were at once confronted with serious difficulty in their endeavor to obey the congressional mandate, and fit the placer mining laws to the exigencies of oil locations, which in their nature were radically dissimilar. Thus it is well established that the sole power of disposition and control of the public lands being vested by the Constitution of the United States in congress (Const. U. S., art. 4, § 3), congress could at any time change its policy in regard to those lands so long as vested rights were not impaired.

It was fully established, also, that a qualified person, who had made a valid location upon a part of the public mineral domain (which valid

location always, of course, included discovery), acquired vested rights, which no change in congressional policy could affect or impair, but *per contra* that a change in policy could impair the rights of one upon the public domain who had not acquired a valid location. As has been said in the case of other minerals, discovery preceded the demarcation of the boundaries, the posting and recording of the notice. In the case of oil, discovery, in the very nature of things, would rarely or never be made except at the end of much time and after the expenditure of much money, the discovery of oil involving the erection of a derrick and the laborious drilling of a well, frequently to the depth of 3,000 feet and more. If, therefore, the placer mining laws, which were declared by congress to be the only laws under which oil locations could be established, were to be made of any practical benefit to the oil locator, it must be by permitting him to mark the boundaries of his location and post and record his notice, and protect him in possession while he was with diligence prosecuting the labor or digging his well to determine whether or not a discovery could be made. So it was held by the federal courts, by the courts of some of the other states, and by this court in Miller v. Chrisman, 140 Cal. 447, 73 Pac. 1084, 74 Pac. 444, 98 Am. St. Rep. 63, to the following effect: "One who thus in good faith makes his location, remains in possession and with due diligence prosecutes his work towards a discovery, is fully protected against all forms of forcible, fraudulent, surreptitious, or clandestine entries and intrusions upon his possession. Such entry must be always peaceable, open and above board, and made in good faith, or no right can be founded upon it." Weed v. Snook, 144 Cal. 439, 77 Pac. 1023; Cosmos, etc., Co. v. Gray Eagle Oil Co. (C. C.), 104 Fed. 20; Id. 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230; Id. 190 U. S. 301, 23 Sup. Ct. 692, 47 L. Ed. 1064; Whiting v. Straup, 17 Wyo. 1, 95 Pac. 849, 129 Am. St. Rep. 1093; Moffat v. Blue River, etc., Co., 33 Colo. 142, 80 Pac. 139. But it is always to be borne in mind that, until the perfection of the inchoate and incomplete location by discovery, the locator has, first, no vested rights which congress is obliged to recognize; so that congress may change its policy in regard to the lands to the extent even of excluding therefrom the diligent operator who has not made discovery. However inequitable such a proceeding might be, it in no way would be illegal; secondly, it is to be observed that the laws touching assessment work are not applicable to such an imperfect location. When the location is valid and complete, the law exacts the doing of but one hundred dollars of work per year, and, when that is done, all of the locator's rights are fully protected, whether he remains in possession longer than is necessary to do that work or not. But where the location is incomplete, no question of assessment work is involved. What the attempting locator has is the right

to continue in possession, undisturbed by any form of hostile or clandestine entry, while he is diligently prosecuting his work to a discovery. This diligent prosecution of the work of discovery does not mean the doing of assessment work. It does not mean the pursuit of capital to prosecute the work. It does not mean any attempted holding by cabin, lumber pile, or unused derrick. It means the diligent, continuous prosecution of the work, with the expenditure of whatever money may be necessary to the end in view. Of such work defendant's grantors were not in the prosecution up to April 12, 1907. They were not only not in the actual possession of the land, as the courts finds, but the evidence discloses that what they had done was no more than an attempt to hold the land under the theory that assessment work was adequate for that purpose. It is shown by the evidence that they were not only not engaged in the diligent prosecution of the work, but that they were not financially able so to prosecute it, and were either in search of capital to enable them to do so, or in search of a purchaser to buy out such interest as it might be thought that they had. The cases of Cosmos, etc., Co. v. Gray Eagle Oil Company (C. C.), 104 Fed. 20, and 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230, are not at all in conflict with these views. To the contrary, these views and those expressed in Miller v. Chrisman, *supra,* Weed v. Snook, *supra,* and New England, etc., Oil Co. v. Congdon, 152 Cal. 211, 92 Pac. 180, are themselves in great part based upon the opinion of the learned circuit judge in those cases. The federal cases involved conflicts between "scrippers" and oil locators, under an act which allowed the scrippers, for the land from which they had been displaced, to "select in lieu thereof an equal tract of vacant land open to entry." They endeavored to select land that was not only in the possession of oil men, but of oil men who were diligently prosecuting their work to a discovery so as to complete their locations. The circuit court held that such land so occupied and worked was not vacant land open to entry within the meaning of the act, and declared (we quote from the syllabus which correctly enunciates the determination): "A claimant of land entered under Act June 4, 1897 (Act June 4, 1897, c. 2, 30 Stat. 36 [U. S. Comp. St. 1901, p. 1541]), in lieu of land situated within a forest reservation, on an affidavit stating its nonmineral character, that it was free from mining claims, and was entered for agricultural purposes, will not be granted relief in equity against another claimant in possession under an oil placer mining location, made prior to such entry, and followed up by development work, which was being prosecuted on the land when the entry was made, and resulted in valuable producing wells, where the affidavit of the entry man was also false in other particulars, the land being valueless for agricultural or grazing purposes, but situated in an oil district,

and the entry being in fact made because of its supposed value for oil, although no discovery of oil had then been made thereon."

Plaintiff filing his homestead entry upon the 12th day of April, 1907, made physical and personal entry on the 5th day of October, 1907—within the six months limited by law. Appellant contends that plaintiff had made no "entry" within the meaning of the law until he took *possessionem pedis* on October 5th; that up to that time he had acquired merely a preferential right of entry over those claiming under the homestead or agricultural laws, but not over those who might have entered under the mining laws. In this connection appellant expounds the different meanings which have been given to the word "entry," and concludes that the entry of a homesteader is not complete, within the meaning of the law, until he has actually gone upon the ground. But this is not the meaning of the word as employed in the statute. In "Suggestions to Homesteaders" issued by the Commissioner of the General Land Office March 9, 1908 (paragraph 27, page 12), it is said: "Actual residence on the lands entered must begin within six months from the date of all homestead entries, except additional entries and adjoining farm entries of the character mentioned in paragraphs 14 and 15, and residence with improvements and annual cultivation must continue until the entry is five years old, except in cases thereafter mentioned, but all entry men who actually reside upon and cultivate lands entered by them prior to making such entries may make final proof at any time after entry when they can show five years' residence and cultivation." Says the Supreme Court of the United States in Hastings & N. D. R. Co. v. Whitney, 132 U. S. 357, 10 Sup. Ct. 112, 33 L. Ed. 363: "Under the homestead law three things are needed to be done in order to constitute an entry on public lands: First, the applicant must make an affidavit setting forth the facts which entitle him to make such entry; second, he must make a formal application; and, third, he must make payment of the money required. When these three requisites are complied with, and the certificate of entry is issued to him, the entry is made—the land is entered." All of these things had been done by plaintiff, and his entry was therefore complete. What effect did this entry have upon the right of defendant subsequently to enter upon the land and exploit it for minerals?

"A homestead entry," says the Supreme Court of the United States, "which is *prima facie* valid removes the land, temporarily at least, out of the public domain." Hastings & N. D. R. Co. v. Whitney, 132 U. S. 357, 10 Sup. Ct. 112, 33 L. Ed. 363; U. S. v. Turner (C. C.), 54 Fed. 228. But appellant contends that this language is to be construed with an exception, and that this exception is that one who claims the land to be valuable for mineral purposes has the right, notwithstanding such homestead entry, to enter thereon and explore it for the valuable minerals

it is thought to contain. Herein reliance is placed upon McClintock v. Bryden, 5 Cal. 97, with the note which is appended to that case in 63 Am. Dec. 87. But it will be found upon examination that that and the cases like it all arose where the land was of proved mineral value, and the decisions were based upon the national laws, which in effect excepted from homestead entry the mineral lands of the nation, the mineral lands being those of more value for mineral than for agricultural purposes. We know of no case, and have been cited to none, where a right of entry upon lands held under an agricultural entry has been permitted without proof of the present value of the lands for mineral purposes merely for the purpose of exploiting them to see if perchance they possess such value. That is precisely what appellant desires here to do, and contends that it has the right to do. No discovery of oil has been made upon the lands, but defendant insists that it has the right to enter and explore them to see if there is oil therein. The decisions are against the existence of such a right. In Lentz v. Victor, 17 Cal. 273, it is declared that such an entry upon an agricultural holding can be justified and upheld only by showing, first, that the land is public land; and, second, "that it contains mines or minerals." The Land Department has uniformly laid down the rule to the following effect: "The burden of proof being upon the protestants (mineral claimants), they are required to show by a preponderance of testimony that the land is more valuable for mining than for agricultural purposes as a present fact; not that it might possibly hereafter develop minerals in such quantity, and of such character, as to establish its mineral value." 1 Land Dec. Dep. Int. 561; Creswell Mining Co. v. Johnson, 8 Land Dec. Dep. Int. 440; Dobler v. Northern Pac. R. Co., 17 Land Dec. Dep. Int. 103; Winscott v. Northern Pac. R. Co., 17 Land Dec. Dep. Int. 274; Southern Pac. R. Co., 25 Land Dec. Dep. Int. 223; Alldritt v. Northern Pac. R. Co., 25 Land Dec. Dep. Int. 349.

For these reasons the judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; MELVIN, J.

SIMMS v. REISNER et al.

[Court of Civil Appeals of Texas, January 27, 1911.]

— Tex. Civ. —, 134 S. W. 278.

1. Oil Lease—Abandonment Not Shown.

Temporary cessation of operations under an oil lease with the expectation to resume work when more oil has drained into the basin does not constitute an abandonment of the lease.

2. Same—No Question of Forfeiture on Temporary Injunction.

The question of whether or not an oil lease has been surrendered or forfeited is not one to be decided on application for temporary injunction against operations by the lessee.

3. Oil Well—Injunction against Unskillful Operation.

Statements of the danger of an adjoining operator's bringing in a salt water well, without evidence of his lack of skill or knowledge of the oil field, held insufficient to justify a temporary injunction.

Appeal from District Court, Harris County; W. P. Hamblen, Judge.

Suit for an injunction, for a writ of possession, and for cancellation of a lease by B. A. Reisner and others against E. F. Simms. Temporary injunction granted. Defendant appeals. Reversed.

For appellant—P. H. Briant and R. U. Culberson.

For appellees—Dannenbaun & Taub.

PLEASANTS, C. J. This appeal is from an order of the district court for the Fifty-fifth Judicial District granting a temporary injunction in a suit in said court brought by appellees against the appellant.

The following concise and accurate statement of the substance of the pleadings and the issues presented thereby, and of the proceedings had in the lower court and the result thereof, is copied from appellant's brief:

"In substance it was alleged in the petition that the appellees were the lessees in a certain oil and gas lease on a tract of land located in the Humble oil field in Harris County, Texas, and that the appellant had

NOTE.

As to the necessity for continued operation under oil and gas leases, see note to Parish Fork Oil Co. v. Bridgewater Gas Co., 22 Mor. Min. Rep, 145.

wrongfully entered on the land covered by said lease, had ejected appellees therefrom, and was, at the time of the filing of the petition, engaged in boring an oil well on said land.

"It was admitted in the petition that the appellant had on or about the 3d day of March, 1905, entered into a contract with one W. E. Armstrong, who was then the owner of the land, by which contract the right was given appellant to bore for oil on the land in controversy. It was alleged, however, that about June, 1906, appellant abandoned said land because the production of oil thereon had become unprofitable, and had delivered possession thereof to the owner, W. E. Armstrong.

"It was also alleged in the petition that appellees were the owners of a producing oil well on certain lands adjoining the tract in controversy, and that, if appellant was permitted to continue his operations on the Armstrong lease, there was danger that salt water would be brought into the field and destroy the producing well.

"The prayer was for an injunction restraining appellant from continuing to bore for oil on the land in controversy, for a writ of possession, and for a cancellation of the lease from Armstrong to appellant.

"A restraining order was issued on the 23d of November, 1910, and the cause set down for hearing on the 26th of November, 1910.

"At the time directed by the order of the judge, the appellant presented his answer, under oath, to the petition. In this answer the appellant claimed that he had in all respects complied with the terms of his lease with Armstrong, had paid the money consideration called for therein, had put down more wells than required by his agreement, and had produced on this lease a quantity of oil amounting in the aggregate to more than 600,000 or 700,000 barrels. He denied that he had ever terminated said lease, or delivered possession of the land covered thereby to Armstrong, or to Stockdick, the subsequent owner, but claimed that he had always asserted his rights under his lease to bore for oil on the land.

"Appellant alleged that, though the wells had ceased temporarily to be productive, 'it was his belief and expectation that in course of time more oil would drain into the basin beneath said lands from contiguous territory, and that when such condition presented itself it had always been his intention to bore again for oil upon the land embraced in said lease.'

"He alleged that the time having arrived when, in his judgment, there was sufficient accumulation of oil to justify operations he began putting down a well on the Armstrong lease, and was so engaged when stopped by the restraining order issued in this cause.

"He alleged that since the wells on the Armstrong lease had watered out, there had been no oil of consequence produced on lands adjacent or near to said Armstrong land, and that at all times he had held himself

ready to protect said lands from drainage from outside wells, should any be dug.

"He denied that he was inexperienced in boring for oil on the land in controversy, or that there was any danger from his operations that salt water would be brought into the field.

"The cause having been heard on the petition, answer, and supporting affidavits, the court, on November 26, 1910, ordered the restraining order to continue in full force and effect.

"The exhibits attached to the pleadings, and the affidavits produced on the hearing in the court below, establish the following facts:

"On March 3, 1905, W. E. Armstrong, who was then the owner of the property upon which appellant claims the right to bore the well the boring of which was enjoined by the court below, made and entered into the following lease contract with appellant:

" 'The State of Texas, Harris County: W. E. Armstrong, lessor, in consideration of the sum of twelve hundred and fifty ($1,250.00) dollars in hand paid by E. F. Simms, lessee, receipt of which is hereby acknowledged, and of the further undertakings of said lessee hereinafter specified, does hereby let and lease unto said lessee, his heirs and assigns, lot number twenty (20) in block number one (1), and lot number twenty (20) in block number two (2) of the Cherry subdivision of the James Strange survey in Harris County, Texas, the terms of this lease beginning with this date and becoming permanent when the undertakings of the lessee hereinafter specified are performed. In consideration of the foregoing, the said lessee hereby agrees and binds himself to bore and develop two (2) wells upon the above-described land under the following conditions, viz.: He shall within thirty (30) days from this date begin boring of the first well on said land and complete the same as soon thereafter as may be possible with reasonable diligence and dispatch, and if said well shall produce oil in flowing quantities, then the said lessee agrees and obligates himself within 30 days after said oil is first brought to the surface, to begin the boring of another well on said tract and to complete the same as soon thereafter as may be done with reasonable diligence and dispatch. The lessee reserves the right to use all fuel, oil, and gas developed from either of said wells that may be necessary in operating and developing the same, and of the remainder of such oil and gas agrees and obligates himself to deliver to the lessor or his order, free of charge in any pipe line that may be convenient or accessible to said well one-fourth (¼) of such production of a flowing well and one-eighth (⅛) of such production of a pumping well. The lessee may bore other wells and produce oil therefrom upon the same terms and conditions at his option. Should any mineral and gas be discovered and produced on said

land, then the parties hereto shall have the same proportionate interest in such production as in the oil and gas hereinbefore mentioned; lessee may terminate this lease when production becomes unprofitable and remove all improvements erected by him.

"'Witness our hands in duplicate, at Houston, Texas, March 3, 1905. W. E. Armstrong, E. F. Simms.'

"Appellant paid the cash consideration mentioned in this lease and immediately took possession of the property, bored several wells thereon, and fully complied with all of the terms and conditions of the lease contract. The wells bored by him were large producers and he successfully operated them until the latter part of 1905, at which time an invasion of water into this portion of the Humble oil field rendered the wells there unproductive and all further operation and development ceased. Appellant moved his improvements and machinery from the property in controversy and took the casing from one of the wells, but left the property in charge of Mr. H. A. McAnallen and requested him to take possession of it and prevent encroachment thereon. McAnallen was in charge of the property continuously, and no one else had possession of it until appellant returned thereto and began boring the well which he was enjoined from boring by the order of the court from which this appeal is prosecuted."

When the wells in this portion of the field became ruined by water, as before stated, it was anticipated that a sufficient quantity of oil from other portions of the field would probably find its way to this property to make its development again profitable. Shortly before appellant began boring the well in question appellees had brought in a productive well on an adjoining lot near the line of the lot in controversy, and appellant at once began to bore the well in question to protect his lease and prevent the oil under the property from being drained into and brought up through appellees' well. On April 25, 1907, W. E. Armstrong conveyed the property covered by appellant's lease to A. Stockdick for a consideration of $50, by deed of general warranty. On May 27, 1910, Stockdick leased the property to appellees for the purpose of development as an oil field, and appellees are claiming in this suit that under this lease they are entitled to the possession of the property. Before his sale to appellees Stockdick recognized appellant's right to further develop the property under his lease and tried to purchase same, but they could not agree upon the price. There is no evidence that appellant ever declared that he had canceled the lease or abandoned his rights thereunder, and neither the lease contract nor the possession of the property was ever delivered to Armstrong, or his vendees.

Ed. McCarvell, one of the plaintiffs, swore that "there was great danger that the defendant, because of his lack of knowledge of said field, will bring in a well producing salt water, and thereby injure or destroy the well now operated by the plaintiffs on lot 21, as well as destroy lot 20 and adjoining lot 19 as producing oil land." There is other testimony to the effect that the bringing in of a salt water well in any portion of an oil field is likely to greatly injure all of the wells in the field. McCarvell does not give any facts tending to show his knowledge of appellant's skill as an oil operator or of appellant's familiarity and acquaintance with the conditions of this oil field. On the contrary, the undisputed evidence of several witnesses shows that appellant has been a successful operator in this field, had bored and operated a number of wells on this and adjoining lots, and there is no evidence that he ever brought in a salt water well. The undisputed evidence further shows that the drillers employed by appellant to drill the well in question "are competent men in their line of work, and have had much experience in drilling oil wells in the Humble oil field." Upon this showing we do not think the trial judge was authorized to grant the injunction. The opinion of the plaintiff McCarvell, that there was danger that appellant, because of lack of experience, might bring in a salt water well, is not only unsupported by any fact in evidence, but is against the undisputed testimony before set out showing that both appellant and the drillers employed by him were thoroughly competent and fully acquainted with all of the conditions existing in this oil field.

We cannot believe that the court upon this evidence found that there was such danger to the field and to appellees' wells from appellant's lack of knowledge of the field and his incompetency as an oil operator as would justify an order preventing him from operating in said field, and appellees do not so contend in their brief. If such was the finding, it cannot be sustained.

The question of whether appellant had surrendered or forfeited his lease, if that question is raised by the evidence, is not one which can be properly decided on the application for a temporary injunction. Appellant was in possession of the land, claiming under his lease. He did not acquire this possession by force or fraud, and, so far as the evidence shows, appellees were never in actual possession of the property. An injunction is not a remedy which can be used for the purpose of recovering title or right of possession of property, and it is not the function of a preliminary injunction to transfer the possession of land from one person to another pending an adjudication of the title, except in cases in which the possession has been forcibly or fraudulently obtained by the defendant and the equities are such as to require that the possession

thus wrongfully invaded be restored, and the original status of the property be preserved pending the decision of the issue of title. Jeff Chaison Town-Site Co. v. McFaddin, Wiess & Kyle Land Co., 121 S. W. 716.

The trial court did not order the possession of the land delivered to appellees, but he enjoined the appellant from using it for the purpose for which it was leased, and thereby rendered his possession worthless. This should not be done unless the use of the property by the appellant would cause injury to appellees against which they could only be adequately protected by an injunction, and this, as we have before said, is not shown by the evidence.

If appellees have a probable right to the possession of the property for the purpose of producing oil therefrom they might in a proper proceeding have the oil taken therefrom by appellant impounded pending the adjudication of their right in same, but the facts presented by this record do not, in our opinion, justify an injunction restraining appellant from boring for oil upon said property.

It follows that the order of the court granting said injunction should be set aside, and it has been so ordered.

MOUND CITY BRICK & GAS CO. v. GOODSPEED GAS & OIL CO.

[Supreme Court of Kansas, July 9, 1910.]

— Kan. —, 109 Pac. 1002.

(Syllabus by the Court.)

1. Taxation—Mining Leases—Failure to Record or List—Statute Construed as Applying to Gas and Oil Lease.

Chapter 244 of the Laws of 1897, providing for the taxation of strata of minerals in land the title to which has been vested in persons other than the owner of the surface, and imposing penalties for its violation, applies to oil and gas, as well as to solid minerals.

2. Same—Severance of Mineral Strata—Duty to Record and List Instrument of Conveyance.

When the different strata are severed by contract or conveyance, each layer or stratum is subject to be taxed separately as real property, and it is the duty of the owner not only to record the instrument which conveyed the property to him within the time specified, but also to see that it is duly listed for taxation at the proper time.

3. Same—Nature of Instrument Effecting Severance of Mineral Strata.

Where an instrument, called a "lease," by which the owner of the land grants, conveys, and warrants to another, his heirs, successors, and assigns, all of the coal, oil, and gas under a tract of land, together with the right to use the surface of the land so far as it is necessary in taking out the minerals so conveyed, the consideration being that the lessee shall give the lessor certain quantities of the coal and oil mined, also a certain price per well for each gas well that shall be drilled and used, and also furnish the lessor gas sufficient to supply his residence and among other things, contains a provision that in a certain contingency the

CASE NOTE.

Statute Providing that Failure to Record Lease or List Property for Taxation Renders Lease Void.

I. Construction and Interpretation of Statute.

The statute under consideration is quoted at length in Mound City Brick & Gas Co. v. Goodspeed Gas & Oil Co., principal case.

This statute construed and interpreted by the Supreme Court of Kansas in a suit to enjoin the sale of the "mineral reserve" of certain land, upon which a gas and oil lease had been granted, for taxes assessed on the mineral estate separated from the land, and to annul the tax. The court held the statute, although showing confusion of thought and inaccuracy of expression, first related to land with the minerals, of which it is in part composed, in place and then relates to and deals with cases where

lessee shall reconvey the property to the lessor, *held*, that the instrument operated to sever the coal, oil, and gas from the remainder of the land, and that the interest segregated and conveyed became subject to be separately taxed and it was incumbent on the owner of the interest to list it for taxation.

Action on oil and gas lease in which defense contended the same was void for failure to record it or list the property for taxation, as required by the statute. Judgment for defendant. Affirmed.

For appellant—Jones and Reid.

For appellee—no appearance.

Action brought by the Mound City Gas, Coal & Oil Company, which had obtained an oil, coal, and gas lease upon a tract of land of which Henry Carbon was the owner, against the Goodspeed Gas & Oil Company, which claimed a subsequent lease on the same premises. The following is a copy of the appellant's lease:

"In consideration of the sum of one dollar, the receipt of which is hereby duly acknowledged, and the covenants and agreements hereinafter contained, Henry Carbon, a widower, of Mound City, Kan., first party, hereby grants, conveys and warrants unto Robert Fleming, second party, his heirs, successors and assigns, all the oil, coal and gas in and under the following described premises, together with the right to enter thereon at all times, for the purpose of drilling and operating for oil, coal, gas or water, to erect, maintain and remove all buildings, structures, pipes, pipe lines and machinery necessary for the production and transportation of oil, coal, gas, water, provided that the first party shall have

the title to the land and that to the minerals has been severed. It contemplates that in such case the estate in the land and the estate in the minerals shall exist in separate persons—that one should have an estate in the land and the other in the minerals; and that in such case the estate of each should be taxed separately, each to the owner thereof; that the whole purpose of the act was taxation, and that it was not framed for the purpose of placing leases of mineral lands in the same category with mortgages and tax-sale certificates; that the only office of the proviso of the law is to accomplish the purpose of the first portion of the act—the taxation of each estate in the property, and that, therefore, the statute applies to such leases only as effect a severance of the mineral from the land, and not to such as give but a right to enter, operate and procure gas, giving no title thereto until actually found and severed. In this case it was found the lease in question did not effect a severance of the mineral, and created no separate estate therein, and hence the construction of the statute may be considered to some extent *dicta*. Kansas Nat. Gas Co. v. Board of Co. Com'rs Neosho County, 75 Kan. 333, 89 Pac. 570 (1907).

The statute applies to such leases only as effect a severance of the title to the land from the mineral and not those leases which amount to a mere license, and grant only the right to exploit the land and take the mineral when found;

the right to use said premises for farming purposes, except such part as is actually occupied by second party, namely, a lot of land situated in the township of the county of Linn in the state of Kansas, and described as follows, to wit: The south half of the southeast quarter of section five (5), and the west half of section four (4) all in township 22, range 24, containing four hundred acres, more or less. The above grant is made on the following terms:

"(1) Said party agrees to drill a well upon said premises within two years from this date or thereafter pay to first party eighty ($80.00) dollars annually until said well is drilled, or this lease shall be void.

"(1½) Should coal be found a royalty of ten cents per ton of 2,400 pounds for all coal mined shall be paid to said first party.

"(2) Should oil be found in paying quantities upon the premises second party agrees to deliver to first party in tanks, or in pipe lines with which it may connect the well or wells, the one-tenth part of all the oil produced and saved from said premises.

"(3) Should gas be found, second party agrees to pay to first party, fifty dollars annually for every well from which gas is used off the premises.

"(4) The first party shall be entitled to enough gas free of cost for domestic use in said residence on said premises as long as second party shall use gas off said premises, under this contract, but shall lay and maintain the service pipe at his own expense, and use said gas at his own risk; the said party of the second part further to have the privilege of excavating for water, and of using sufficient water, gas and oil from the premises herein leased to run the necessary engines for the prosecution of said business.

under the latter no title to the mineral vests until it is found and severed from the land. Cherokee & Pittsburg Coal & Min. Co. v. Board of Co. Com'rs Crawford County, 71 Kan. 276, 80 Pac. 601 (1905); Kansas Nat. Gas Co. v. Board of Co. Comrs. Neosho County, 75 Kan. 333, 89 Pac. 570 (1907).

Under Kansas statute a lease does not become void by a mere failure to record it, but only where there is the additional delinquency of omitting to list it for taxation. Mound City Brick & Gas Co. v. Goodspeed Gas & Oil Co., principal case.

Statute of Ohio providing that all leases, licenses or assignments thereof, or of any interest therein, whereby any right to sink or drill wells for natural gas or petroleum is given be forthwith recorded, and that unless so recorded they be invalid unless the person claiming thereunder be in the actual and open possession of the property, etc., was held valid; and it was further held that the statute applied to a renewal of a lease under the provision of the original lease, therefore a subsequent lessee would hold as against the renewal where the same was not recorded, and the original lessee was not in the actual and open possession of the property. Northwestern Ohio Nat. Gas. Co. v. City of Tiffin, 59 Ohio St. 420, 54 N. E. 77 (1899).

Under the statute mentioned in the case last cited it was held an assignee

"(5) Second party shall bury, when requested to do so by first party, all gas lines used to connect gas off said premises, and pay all damages to timber and crops by reason of drilling and burying, repairing or removal of lines of pipe over said premises.

"(6) No well shall be drilled nearer than 300 feet to any building now on said premises, nor occupy more than two acres.

"(7) Second party may at any time reconvey the premises hereby granted, first removing any of his property that may be thereon and thereupon this instrument shall be null and void.

"(8) A deposit to the credit of the lessor in Farmers' & Merchants' Bank, Mound City, Kan., to the amount of any of the money payments herein provided for, shall be payment under the terms of this lease.

"(9) If no well shall be drilled upon said premises within ten years from this date, second party agrees to reconvey and thereupon this instrument shall be null and void.

"(10) First party reserves to himself all oil and gas now on said premises, together with the right to drill wells on said premises for products to be used on said premises for domestic purposes.

"In witness whereof, the parties hereunto set their hands this ——— day of June, A. D. 1902. Henry Carbon."

The execution of the foregoing instrument was duly acknowledged. An assignment of the lease to persons who organized the Mound City Gas, Coal & Oil Company was alleged. Among other defenses, the Goodspeed Gas & Oil Company alleged that the lease above set forth was not recorded nor listed for taxation within 90 days after its execution and has never been listed for taxation. Afterwards the Mound City

for the benefit of creditors would take title to the lease over a former assignment to secure an indebtedness, where no possession was taken and the first assignment was not recorded. Keystone Bank v. Union Oil Co., 25 Ohio Cir. Ct. 464 (1903).

Statute providing that upon failure to receive any bid at a sale for delinquent taxes the right, title and interest of every person, whomsoever, therein shall vest absolutely in the state, held to give the state only a lien for the unpaid taxes. State v. Heman, 70 Mo. 441 (1879).

Where owners of lease fail to record or list it for taxation, it may be declared void at the instance of any interested party. Mound City Brick & Gas Co. v. Goodspeed Gas & Oil Co., principal case.

For the origin, reasons and history of the law, see King v. Mullins, 171 U. S. 404, 18 Sup. Ct. 925, 42 L. Ed. 214 (1898); Fay v. Crozier, 156 Fed. 486 (1907).

II. Applies to Oil and Gas Leases.

A statute providing that where the fee to the surface of any land is in one person and the title to any minerals therein in another, the right to such minerals shall be valued and listed separately from the fee of the land, and making it the duty of the owner of the title to the minerals to list the same for taxation, and providing that any lease thereof not recorded within ninety

Brick & Gas Company was substituted for the Mound City Gas, Coal & Oil Company; the title and interest of the latter company having passed to the substituted company. The court on motion of the defendant gave judgment on the pleadings in favor of the Goodspeed Gas & Oil Company, and the Mound City Brick & Gas Company appeals.

JOHNSTON, C. J. (after stating the facts as above). The only question presented for consideration is whether the failure of appellant to have the lease in question recorded within 90 days after its execution and to have the property listed for taxation renders the lease null and void. The trial court, it is stated, held that the lease was void for noncompliance with chapter 244 of the Laws of 1897 (Gen. St. 1909, § 9334). It reads: "That where the fee to the surface of any tract, parcel or lot of land is in any person or persons, natural or artificial, and the right or title to any minerals therein is in another or in others, the right to such minerals shall be valued and listed separately from the fee of said land, in separate entries and descriptions, and such land itself and said right to the minerals therein shall be separately taxed to the owners thereof respectively. The register of deeds shall furnish to the county clerk, who shall furnish on the first day of March each year to each assessor where such mineral reserves exist and are a matter of record, a certified description of all such reserves: Provided, that when such reserves or leases are not recorded within ninety days after execution, they shall become void if not listed for taxation."

This provision has been interpreted and its validity upheld. Mining Co. v. Crawford County, 71 Kan. 276, 80 Pac. 601; Gas Co. v. Neosho

days after execution shall become void if not listed for taxation, includes within its operation oil and gas leases, and they become void if the statute is not complied with. Mound City Brick & Gas Co. v. Goodspeed Gas & Oil Co., principal case. Cherokee & Pittsburg Coal & Min. Co. v. Board of Co. Comrs. Crawford County, 71 Kan. 276, 80 Pac. 601 (1905); Kansas Nat. Gas Co. v. Board of Co. Comrs. Neosho County, 75 Kan. 333, 89 Pac. 570 (1907).

Although oil and gas in place is part of the realty, the stratum in which they are found is capable of severance, and the party to whom such stratum is conveyed acquires an estate and title therein, which becomes a subject of taxation. Mound City Brick & Gas Co. v. Goodspeed Gas & Oil Co., principal case.

III. Constitutionality of Statute.

Statute providing that lease of mineral, when separated from the fee, shall be void unless recorded and listed for taxation within a certain period, is constitutional and valid. Mound City Brick & Gas Co. v. Goodspeed Gas & Oil Co., principal case.

The statute is not unconstitutional as providing an unequal and inequitable valuation and assessment, because when properly construed it does not mean that where both the fee and the mineral are in one person the mineral is not to be taxed, but is to be taxed only when the fee is in one and the mineral in

County, 75 Kan. 335, 89 Pac. 750. It is argued that the act was only intended to apply to solid minerals, such as coal, lead, and zinc, and that because of their peculiar attributes oil and gas are not capable of ownership in place and cannot have been within the legislative purpose. The terms of the act are broad enough to embrace minerals of every kind, and it is well settled that oil and gas, although fugitive fluids, are minerals. Zinc Co. v. Freeman, 69 Kan. 691, 76 Pac. 1130; Murray v. Allred, 100 Tenn. 100, 43 S. W. 355, 39 L. R. A. 249, 66 Am. St. Rep. 740.

It has also been determined that, although oil and gas in place are a part of the realty, the stratum in which they are found is capable of severance, and by an appropriate writing the owner of the land may transfer the stratum containing oil and gas to another. Such party acquired an estate in and title to the stratum of oil and gas, and thereafter it becomes the subject of taxation, incumbrance, or conveyance. Kurt v. Lanyon, 72 Kan. 60, 82 Pac. 459; Moore v. Griffin, 72 Kan. 164, 83 Pac. 395, 4 L. R. A. (N. S.) 477; Barrett v. Coal Co., 70 Kan. 649, 79 Pac. 150; Chartiers' Block Coal Co. v. Mellon, 152 Pa. 286, 25 Atl. 597, 18 L. R. A. 702, 34 Am. St. Rep. 645.

It being competent for an owner of land by contract or conveyance to sever an underlying layer or stratum of oil or gas from other parts of the land, and thus vest the title of the layer in another, there remains the question whether the writing executed by Henry Carbon is sufficient to accomplish a severance of the mineral from the remainder of the land. The ordinary agreement giving the lessee the right to enter and explore for oil and gas and to sever and own any that may be found, paying a royalty to the owner of the land, is a license, which does not operate

another. In other provisions of the tax laws provision is made for taxing lands (which includes the mineral when not severed) at their full value. The act under consideration was passed to meet a newly developed class of property, and in order that all property might be required to bear its just proportion of the burden of taxation. Cherokee & Pittsburg Coal & Min. Co. v. Board of Co. Comrs. Crawford County, 71 Kan. 276, 80 Pac. 601 (1905).

The statute is not void as containing no provision for the ascertainment of the value of the mineral property for the purposes of taxation. The act is supplementary to the general tax laws of the state and, as all statutes *in pari materia* are to be read and construed together, if any provisions for its complete enforcement be found wanting in the act itself they may be found in the general tax laws of the state. Cherokee & Pittsburg Coal & Min. Co. v. Board of Co. Comrs. Crawford County, 71 Kan. 276, 80 Pac. 601 (1905).

IV. Effect of Failure to List or Defective Listing.

Where the owner has in good faith attempted to list the property, it will not be held forfeited because of some irregularity in the proceeding. Lohr v. Miller, 12 Gratt. (Va.) 452 (1855).

There can be no forfeiture for nonentry for taxation of the estate in minerals severed by lease where the assessor fails to charge it separate from the fee

as a severance of the minerals. In Gas Co. v. Neosho County, *supra*, the act providing for taxing separate mineral interests in lands was considered, and it was there pointed out that a lease of the type just mentioned grants no estate, gives no title, does not operate to sever the oil and gas from the land, and is therefore not separately taxable to the lessee. On the other hand, attention is called to another class of writings which do transfer an estate in the mineral and operate to sever the ownership of the oil and gas from the ownership of the surface. It will be observed that the lease in question gives more than a license, more than an incorporeal hereditament. It "grants, conveys and warrants unto Robert Fleming, second party, his heirs, successors and assigns, all the oil, coal and gas in and under the following described premises." In connection with the grant, the right is given to enter and use the surface so far as may be necessary for the second party to avail himself of the use and benefit of the part conveyed. The consideration was a certain quantity of the coal and oil produced and a certain amount annually for each gas well used, together with gas sufficient to supply the residence of the grantor. In another paragraph of the instrument provision is made for the reconveyance of the premises by the second party; it being stipulated that if no well is drilled within 10 years he shall reconvey the property to the first party, and when this is done the instrument first made shall be null and void. There is also a provision that the first party reserves to himself oil and gas for his own use on the premises for domestic purposes.

The language of the instrument is manifestly that of a grant and not of a license. It purports to convey all of the coal, oil, and gas underneath

in the land, and the owner of the land is charged with and pays on the full value of the land with the minerals included. The payment upon the full value is a satisfaction and the object of the law has been accomplished. State v. Low, 46 W. Va. 451, 33 S. E. 271 (1899).

V. Constitutionality of Tax Statutes Imposing Forfeitures.

A. Such Statutes Are Constitutional.

Statutes providing for the forfeiture of property for failure to list it for taxation or for the nonpayment of taxes thereon, have been often upheld and declared constitutional.

United States.—Bennett v. Hunter, 76 U. S. (9 Wall.) 326, 19 L. Ed 672 (1870); King & Mullins, 171 U. S. 404, 18 Sup. Ct. 925, 43 L. Ed. 214 (1898); Schenk v. Peay, 1 Dill. 267 (partial report), Fed. Cas. No. 12,451, full report (1869); Van Gulden v. Virginia Coal & Iron Co., 52 Fed. 838, 3 C. C. A. 294, 8 U. S. App. 229 (1892); Lasher v. McCreery, 66 Fed. 834 (1895); Fay & Crozer, 156 Fed. 486 (1907); Miller v. Ahrens, 163 Fed. 870 (1908).

Arkansas.—Kelly v. Sallinger, 53 Ark. 114 (1890).

Florida.—Dickerson v. Acosta, 15 Fla. 614 (1876).

Kansas.—Cherokee & Pittsburg Coal & Min. Co. v. Board of Co. Comrs. Crawford County, 71 Kan. 276, 80 Pac. 601 (1905); Kansas Nat. Gas Co. v. Board Co. Com'rs Neosho County, 75

the tract of land, instead of a privilege or license to prospect for and to sever and own so much of it as the lessee might find. It transfers at once and makes him the owner of the minerals under this tract of land —a very different thing from giving him the right to prospect and to own only that which he finds and brings to the surface. The character of the instrument is indicated to some extent by the fact that the grant, together with the accompanying rights and privileges, was extended to the heirs, successors, and assigns of the grantee. Then there is the reservation of oil and gas for domestic purposes, by which the grantor proceeds on the theory that he is taking back something out of that which was granted and which would have passed to the grantee but for the reservation. The name by which the writing is designated is not a matter of great consequence, as what is called a "lease" may as effectually transfer the minerals underneath a tract of land as a more formal instrument of conveyance. A severance such as the statute in question contemplates may be made by an exception or reservation in a deed, or by an express grant in any other instrument. In Sanderson v. Scranton, 105 Pa. 469, where there was an agreement by an owner leasing all of the coal under the surface of land and providing that a certain quantity should be mined by the lessee each year, that monthly payments should be made by the lessee in proportion to the quantity mined, and extending the rights and privileges conferred by the lease to the heirs, excutors, administrators, and assigns, it was held "that this agreement was not merely a license or lease to mine coal to become the lessee's when mined, but it operated as such a severance of the surface and subjacent strata,

Kan. 335, 89 Pac. 750 (1907); Mound City Brick & Gas Co. v. Goodspeed, principal case.

Kentucky.—Barbour & Nelson, 11 Ky. (1 Litt.) 60 (1822); Robinson v. Huff, 13 Ky. (3 Litt.) 38 (1823); Marshall v. McDonald, 75 Ky. (12 Bush) 378 (1876); Kentucky Union Co. v. Commonwealth, 33 Ky. L. Rep. 9, 49, 108 S. W. 931 (1908), rehearing denied 33 Ky. L. Rep. 587, 110 S. W. 931 (1908).

Louisiana.—Hall v. Hall, 23 La. Ann. 135 (1871); Morrison v. Larkin, 26 La. Ann. 699 (1874).

Maine.—Hodgdon v. Wight, 36 Me. 326 (1853); Tolman v. Hobbs, 68 Me. 316 (1878).

South Carolina.—State v. Thompson, 18 S. C. 538 (1882); Owens v. Owens, 25 S. C. 155 (1886).

Virginia.—Kinney v. Beverly, 2 Hen. & M. (Va.) 318 (1808); Staat's Lessee v. Board, 10 Gratt. (Va.) 400 (1853); Wild v. Serpell, 10 Gratt. (Va.) 405 (1853); Hale v. Branscun, 10 Gratt. (Va.) 418 (1853); Smith's Lessee v. Chapman, 10 Gratt. (Va.) 445 (1853); Lohr v. Miller, 12 Gratt. (Va.) 452 (1855); Usher's Heirs v. Pride, 15 Gratt. (Va.) 421 (1858).

West Virginia.—Smith & Thorp, 17 W. Va. 221 (1880); Holley River Coal Co. v. Howell, 36 W. Va. 489 (1892); Yokum v. Fickey, 37 W. Va. 762, 17 S. E. 318 (1893); State v. Cheney, 45 W. Va. 478, 31 S. E. 920 (1898); State v. Swann, 46 W. Va. 128, 33 S. E. 89 (1899), affirmed 188 U. S. 739, 23 Sup. Ct. 848, 47 L. Ed. 677 (1903); State v. Sponaugle, 45 W. Va. 415, 32 S. E.

and a sale or assignment of the coal in place, as would relieve the owner of the surface from responsibility for taxes levied upon the coal." See, also, Peterson v. Hall, 57 W. Va. 535, 50 S. E. 603.

We see no difference in applying the act to cases such as this, where the underlying strata of land have become vested in different owners. Counsel for appellant says the lease or reserve must be taxed, if at all, as personal property, and suggest difficulties in determining the situs of such property. It is the interests or estates severed and created which are to be taxed, and not the instrument creating the separate interests. In Gas Co. v. Neosho County, *supra,* it was demonstrated that the mineral rights carved out, and which were to be subject to taxation, were to be treated as realty, and not as personal property. It was said: "It is contemplated that there shall be an estate consisting of what is left after the mineral rights have been carved out, and that there shall be an estate consisting of the mineral rights which have been segregated. The statute further contemplates that each estate must vest in a separate person. The respective proprietors are called 'owners,' and the estate in the minerals is nothing short of the right or title to the minerals themselves as they lie in the ground." In Mining Co. v. Crawford County, supra, it was suggested that there would be difficulty in enforcing the act and in the assessment of such segregated property; but the suggestion was met by saying that the value of such property might be ascertained and the assessment made under the general rules governing the assessment of real property. As it is the interest in the land, and not the instrument, which transfers the interest that is taxed, the indefiniteness

283 (1898); State v. Low, 46 W. Va. 451, 33 S. E. 271 (1899); Sult v. Hochstetter Oil Co., 63 W. Va. 317, 61 S. E. 307 (1908).

For a discussion of the constitutionality of statutes for enforcing taxation with reference to the guaranty of "due process of law," see McMillan v. Anderson, 95 U. S. 37, 24 L. Ed. 335 (1877); Hagar v. Reclamation District, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569 (1884); Cincinnati, N. O. & T. P. R. Co. v. Kentucky, 115 U. S. 321, 6 Sup. Ct. 57, 29 L. Ed. 414 (1885); King v. Mullins, 171 U. S. 404, 18 Sup. Ct. 925, 43 L. Ed. 214 (1898).

B. Unconstitutional.

Griffin v. Mixon, 38 Miss. 424 (1860), holds statutes for the forfeiture to the state for failure to pay taxes to be a violation of the provisions of the bill of rights prohibiting the taking of private property for public use without just compensation, reviewing the adjudicated cases on the subject.

Martin v. Snowden, 18 Gratt. (Va.) 127 (1868), holds that congress has not the constitutional power to impose an absolute forfeiture for the nonpayment of taxes assessed or levied by it. The power to provide for a sale of property is limited to the object thereof, and therefore there can be no provision for a sale of the whole property where it is divisible, and the sale of a part is sufficient to pay the delinquent tax.

As to petroleum and natural gas being minerals, see note to Whiting v. Straup, p. —, vol. 2, this series.

which counsel see in the act largely disappears. The lease does not become void by the mere failure to record it, but only when there is the additional delinquency of omitting to list it for taxation. If it is recorded as the statute enjoins, the taxing officer has an opportunity to find and assess the property conveyed by it, and if the owners omit to record the lease, and further omit to list it, and thus bring it to the attention of the taxing officials within the time fixed for listing property, the lease then becomes void and may be so declared by the court at the instance of any interested party.

As the owner of the interest in question failed to record the lease within the prescribed time, and also failed to list the property for taxation, the lease was a nullity, and the judgment of the trial court deciding that it was void will be affirmed. All the justices concurring.

As to the nature of the title of the lessee under gas and oil leases, see part VII of note to Bellevue Gas & Oil Co. v. Pennell, *post*, p. 403.

As to peculiar rules of construction applied to oil and gas leases, see note to Bellevue Gas & Oil Co. v. Pennell, *post*, p. 396.

As to construction of lease for a certain term and "so long as oil and gas are found in paying quantities," see note to McGraw Oil & Gas Co. v. Kennedy, p. ——, vol. 2, this series.

As to exploration, development and operation required under gas or oil lease, see note to Mills v. Hartz, p. ——, vol. 3, this series.

As to the effect of nonexistence or exhaustion of the mineral on gas and oil leases, see note to Bannan v. Graeff, *post*, p. 548.

CHRISTY v. UNION OIL & GAS CO.

[Supreme Court of Oklahoma, March 21, 1911.]

—Okla. —, 114 Pac. 740.

1. **Mechanics' Liens—Statutory.**
The law relating to mechanics' liens is entirely statutory and parties claiming rights thereunder must bring themselves within the plain terms of the law.

2. **Same—Subcontractor's Right in Oil or Gas Leasehold.**
Under a statute giving a subcontractor a right of lien on an oil or gas leasehold to the same extent as the original contractor, an agreement that there shall be no liability until the work is completed is equally binding on the subcontractor.

Error from the District Court, Kay County; Wm. M. Bowles, Judge.

Action to foreclose a lien by Gus Christy against the Union Oil & Gas Company. Judgment for defendant. Plaintiff brings error. Affirmed.

For plaintiff—Pratt, Moss & Turner.

For defendant—Tetirick & Curran.

DUNN, J. This case presents error from the district court of Kay County. September 28, 1906, plaintiff in error, as plaintiff, filed his petition against defendant in error as defendant, and Earnshaw & Kevan, as partners, for the purpose of foreclosing a subcontractor's lien. For the purpose of this case it was conceded that the owner of the leasehold was not indebted to the contractor who employed plaintiff, due to the fact that he had, without the fault of the owner, abandoned the work; the contract provided that until the work was completed the owner should be under no liability to the contractor. It was further conceded that the terms of the contract were known to the plaintiff at the time he was doing the work, and at the time he filed his lien; and that at the time he began his action he knew that under the specific terms of the contract the owner owed the contractor nothing. The question therefore arises, under these conditions, Is the plaintiff entitled to enforce a lien on the leasehold for the value of the services which he rendered the contractor?

NOTE.

On the rights of laborers and material men to a lien on mine and improvements, see note to Chappius v. Blankman, 20 Mor. Min. Rep. 461. Services for which mechanics' liens are allowed, see note to Gray v. New Mexico Pumice Stone Co., *ante*, p. 157.

The law relating to the liens of mechanics is statutory, and its scope, operation, and effect, measured by the terms of the written law. Toledo Novelty Works v. Bernheimer, 8 Minn. 118 (Gil. 92). And implications extending the operation thereof in favor of subcontractors are not favored; parties claiming rights thereunder are required to show that they come or bring themselves within the plain terms of the law, and where they do not they are excluded from its benefits. Phillips on Mechanics' Liens, § 45; Shields v. Morrow, 51 Tex. 393; Ayres et al. v. Revere et al., 25 N. J. Law 474. The section of the statute under which the plaintiff claims his right to recover is section 2, art. 5, c. 28, p. 324, Session Laws of Oklahoma, 1905 (section 6171, Comp. Laws Okla. 1909), which reads as follows: "Any person, copartnership or corporation who shall furnish such machinery or supplies to a subcontractor under a contractor, or any person who shall perform such labor under a subcontract with a contractor or who as an artisan or day laborer in the employ of such contractor and who shall perform any such labor, may obtain a lien upon said leasehold for oil and gas purposes or any gas pipe line or any oil pipe line from the same tank (time) and in the same manner and to the same extent as the original contractor for the amount due him for such labor, as provided in section 1 of this act (6170)."

The same session of the legislature passed an act, article 1 of chapter 28, Session Laws of Oklahoma, 1905, which related to the general subject of mechanics' liens. Section 2 of that act (section 6153, Comp. Laws Okla. 1909), in so far as the same is pertinent to this discussion, is as follows: "Any person who shall furnish any such material or perform such labor under a subcontract with the contractor, or as an artisan or day laborer in the employ of such contractor, may obtain a lien upon such land, or improvements, or both, from the same time, in the same manner, and to the same extent as the original contractor, for the amount due him for such material and labor * * * by filing with the clerk of the district court of the county in which the land is situated, within sixty days after the date upon which material was last furnished or labor last performed under such subcontract, a statement, verified by affidavit. * * * Immediately upon the filing of such statement the clerk of the district court shall enter a record of the same in the docket provided for in section 6152, and in the manner therein specified, that the owner of any land affected by such lien shall not thereby become liable to any claimant for any greater amount than he contracted to pay the original contractor."

The latter act was approved March 13, 1905, while the former, which related particularly to the performing of labor or furnishing of materials or supplies to owners of leaseholds for oil and gas purposes, and for

material and labor for the building of pipe lines, was approved March 15, 1905, and it is the argument and contention of counsel for plaintiff that, notwithstanding section 2 of both acts contains the language that the lien shall obtain "from the same time, in the same manner, and to the same extent as the original contractor for the amount due him for such labor," that it was the intention of the legislature in the passage of the act relating to oil and gas, that the subcontractor might secure a lien, independent of whether the owner of the leasehold or property was indebted to the contractor, and that this intention was made manifest by the absence from what may be termed the oil and gas act, of the following language contained in the other, "that the owner of any land affected by such lien shall not thereby become liable to any claimant for any greater amount than he contracted to pay the original contractor," the argument made being that, both acts having been passed at the same session of the legislature, that effect in the construction of this act must of necessity be given to the absence therein of the language mentioned quoted from the other, and that if effect is given to it plaintiff would be entitled to recover against the defendants herein, notwithstanding the fact that under the contract which it had made to secure the performance of the work it owed absolutely nothing to the man with whom it dealt.

We cannot agree with counsel. The act is an act covering a specific subject, and the construction which counsel seek to have placed thereon is one which, if within the intent of the legislature, should, and we believe would, have been made manifest in language of plain and unambiguous meaning, and not left to conjecture or implication. In addition to the fact that language is lacking clearly fixing the liability contended for, it is to be observed that the section involved allows the part to contain a lien "from the same tank (time) and in the same manner and to the same extent as the original contractor." This, it appears to us, manifested a clear intention on the part of the legislature to relieve the leaseholder from any liability in addition to that which he had voluntarily assumed in his contract, or for which he was otherwise legally liable, and left a subcontractor to his remedy against his employer for all services rendered or material furnished in excess thereof.

Speaking generally on this subject, Phillips on Mechanics' Liens (2d Ed.) § 45, says: "But few presumptions are made in favor of subcontractors, and they must invariably show that they come within the plain words of the law. When they do not, they will be excluded from its benefits. Thus, where all the previous statutes of a state contemplated a lien only in favor of an original contractor, with the right to a subcontractor to give notice to the owner of his claim, and then bring a personal action against the owner for the unpaid balance, it was held that a law

providing that 'any person or firm, artisan or mechanic, who may labor or furnish materials to erect any house shall have a lien,' etc., did not extend the lien to subcontractors on the ground that the provisions of the law ought to be positive and express, to authorize an unlimited lien on an owner's property, where there was no privity of contract, and irrespective of the amount of the original contract."

In support thereof there is cited the case of Shields v. Morrow, *supra*. The plaintiff, who was a subcontractor, relied upon an act of the Texas Legislature, dated November 17, 1871 (Paschal's Dig., art. 7112). He had brought his action against the owner of the land to enforce his lien for services rendered and material furnished as a painter and glazier. Construing the act, which it will be noted lacks the limitations contained in our statute, and in support of the proposition which we have laid down above that, to make a party liable in excess of his express contract, the provisions of law should be positive and certain, and not be left to mere implication, the Supreme Court of Texas said: "So much of this act as is necessary for the purpose of this opinion provides that any person or firm, artisan or mechanic, who may labor, furnish material, machinery, fixtures and tools to erect any house improvements, or to repair any building or article or any improvement whatever, shall have a lien on such article, house, building, fixtures or improvements, and shall also have a lien on the lot or lots or land necessarily connected therewith, to secure payment for labor done, material and fixtures furnished for construction or repairs. In order to fix and secure the lien herein provided for, the contractor, mechanic, laborer, or artisan furnishing material shall have the right at any time within six months after such debt becomes due to file his contract in the office of the district clerk of the county in which such property is situated, and cause the same to be recorded in a book to be kept by the district clerk for that purpose. If the contract be verbal, a duplicate copy of the bill of particulars shall be made under oath, one to be filed and recorded as provided for written contracts, and the other to be served upon the party owing the debt. The material question arising upon the demurrer, and which is decisive of the case, is this: Is a subcontractor who supplies work and material upon a building not under a contract with the owner, but with the master builder alone, entitled, under the provisions of the above act, to the mechanic's lien, for the payment thereof, upon the lot and buildings? This character of lien is not given by the common law, but depends upon statute. Pratt v. Tudor, 14 Tex. 39. * * * It may be very seriously doubted, indeed, whether the legislature has the power, as contended by counsel for appellant, to establish and fix a lien on property, as against the owner, in favor of a subcontractor, between whom there was no

privity of contract, for any greater amount than was due by the owner to the principal contractor at the date when notice of the intention to thus fix the lien was given to the owner. If this, under any principles of justice, could be done at all, the provisions of the law should be positive and express to authorize the courts to give it this construction, and not be left, as in this statute of November 17, 1871, to mere implication. To give this, in connection with the previous statutes upon the same subject-matter, the construction now placed upon it by the court fully meets all of its reasonable requirements; gives, with the use of proper diligence, ample protection to the subcontractor; and at the same time protects the just rights of the owner of the property. To give it the construction contended for by counsel for the appellant jeopardizes the property of the owner to the risk of a lien, made without his knowledge or consent, which may be extended indefinitely by the contract of a third party, perhaps entirely unknown to him, and for the payment of a claim which he had long before settled in good faith with the principal contractor, and in accordance with their deliberate agreement."

The law relating to mechanics' liens as has been noted is purely of statutory origin, and is not uniform among the states of the Union. Some legislatures have passed acts authorizing a subcontractor to recover for his labor and material and to have a lien impressed upon the property improved without reference to the contract between the owner and the original contractor. The constitutionality of such acts, although mooted, has been by the courts sustained; but, in order that a man's property may have a lien impressed upon it without his direct knowledge and in excess of a definite specific contract, it occurs to us that the law under which it is effected should be couched in such clear and unambiguous terms that every man intending to improve should and would know when he deals with his contractor that he constitutes of him a vice principal, endowed with authority to subject his property to the liens of all whom he may select to furnish material or labor thereon, and this without reference to the owner's specific contract. In the case at bar defendant never intended to assume the burden which is here sought to be placed upon it. This fact was known to plaintiff when he contracted, and he knew that he was not entitled under the contract made to the benefit which he now seeks to secure, and, concluding as we do that the statute relied on does not confer on him the right which he claims, the judgment of the trial court is accordingly affirmed.

TURNER, C. J., and KANE and HAYES, JJ., concur. WILLIAMS, J., not participating.

BARTON et al. v. LACLEDE OIL & MINING CO.

[Supreme Court of Oklahoma, November 16, 1910.]

— Okla. —, 112 Pac. 965.

1. Oil and Gas Lease Construed.

A contract allowing to the plaintiff one-tenth portion of each prospective gas well, when utilized and sold off the premises, held not satisfied by an agreement with another party to convey and market the gas for 50 per cent. and the payment of 5 per cent. to the plaintiff.

Error from Creek County Court; Josiah J. Davis, Judge.

Assumpsit on a gas contract brought by R. L. Barton and others against the Laclede Oil & Mining Company. Judgment for defendant. Plaintiff brings error. Reversed and remanded.

For plaintiff in error—McDougal, Lattimore & Lytle.

WILLIAMS, J. On the 22d day of September, 1908, the plaintiffs in error as plaintiffs instituted an action in the county court of Creek County against the defendant in error as defendant on a certain contract, which in part provided: "It is further agreed that, if gas is obtained and utilized, the consideration in full of the party of the first part shall be one-tenth portion of each and every gas well drilled on the premises herein described when utilized and sold off the premises, payable monthly as long as gas is to be so utilized." Said contract was executed on the 1st day of May, 1906, and thereafter gas was found on said premises, and on the 17th day of December, 1907, the Laclede Oil & Mining Company, as party of the first part, and the Bellevue Oil & Gas Company of Independence, Kan., as party of the second part, without the consent of the plaintiffs in error, entered into a contract wherein the defendant in error agreed to sell gas to the said Bellevue Gas & Oil Company that was discovered under the said lease with the plaintiffs in error, the same to be received by the said the Bellevue Gas & Oil Company at certain rates, it being provided "that for the gas used (by the Bellevue Gas & Oil Company) shall be paid the one-half portion of the proceeds of collection arising from the use and sale of gas each month for the month

NOTE.

For particular rules of construction applied to oil and gas leases see note to Bellevue Gas & Oil Company v. Pennell, *post*, p. 396.

preceding." In other words, the defendant in error contracted with the plaintiffs in error that, "if gas is obtained and utilized" from their land, "the consideration in full of the party of the first part shall be one-tenth portion of each and every gas well drilled on the premises" described in said contract "when utilized and sold off the premises, payable so long as gas is to be so utilized."

The defendant in error having contracted with the Bellevue Oil & Gas Company of Independence, Kan., without the consent of the plaintiffs in error, to give it 50 per cent. for piping and selling said gas, if its contention be correct, it would result in the plaintiffs in error obtaining merely 5 per cent. of said gas when "utilized and sold off the premises." We think that the contract means just what it says, that the plaintiffs in error were entitled to one-tenth of said gas when "utilized and sold off the premises," and that it was incumbent upon the defendant in error to sell and to pay the plaintiffs in error one-tenth of the proceeds.

The judgment of the lower court is reversed, and this cause is remanded, with instructions to enter judgment in favor of the plaintiffs in error. All the justices concur.

SEIBERT v. LOVELL et al.

[Supreme Court of Iowa, December 13, 1904.]

92 Iowa 507, 61 N. W. 197.

1, **Drainage District—Jurisdiction of Supervisors—Withdrawal of Petitioner.**

The jurisdiction of a board of supervisors to establish a drainage district vests upon the filing of the petition, and this cannot be ousted by attempted withdrawal of the petition after it is filed.

2. **Same—Residence of Petitioners.**

The drainage statute does not provide that petitioners should reside near the land proposed to be improved or be interested in the proposed improvement, but only that one hundred legal voters of the county should sign the petition in order to set the machinery of the law in motion.

CASE NOTE.

Powers of Commissioners, Etc.

As to the legal character of drainage districts, see note to People ex rel. Chapman v. Sacramento Drainage District, *ante*, p. 107.

As to constitutional power to establish drains and drainage districts, see note to Chicago, B. & Q. R. Co. v. Board of Supervisors of Appanoose County, *post*, p. 459.

As to source of legislative power to drain lands, see note to Coffman v. St. Frances Drainage District, vol. 3, this series.

As to whether action in regard to drainage is legislative or judicial, see note to Smith v. Claussen Park Drainage & Levee District, vol. 2, this series.

As to notice required as due process of law, see note to Ross v. Board of Supervisors of Wright County, *post*, p. 358.

As to necessity that public benefit and interest must be involved, see note to Campbell v. Youngson, vol. 3, this series.

As to inclusion or exclusion of lands in drainage district, see note to Hull v. Sangamon River Drainage District, *post*, p. 593.

As to conclusiveness of decision of drainage commissioners and other officers, see note to Chapman & Dewey Land Co. v. Wilson, vol. 2, this series.

3. Statutes—Courts Cannot Cure Defective.

A court cannot override the plain provisions of a statute, and if it is defective and the rights of citizens are not properly protected, resort must be had to the legislature for relief.

Writ of certiorari to test proceedings of board of supervisors in establishing drainage districts. Judgment for defendant in lower court, affirmed.

For appellant—Richard Wilbur and C. L. Nelson.

For appellee—W. E. Bradford.

As to waiver of irregularities in drainage proceedings, see note to Smith v. Claussen Park Drainage & Levee District, vol. 3, this series.

As to bonds of drainage districts, see note to Sisson v. Board of Supervisors of Buena Vista County, vol. 3, this series.

For historical review of reclamation districts in California, see People ex rel. Chapman v. Sacramento Drainage District, *post*, p. 107.

I. Power Statutory—Strict Compliance.

The powers of commissioners in drainage matters are derived solely from the statute and they have such authority only as is vested in them by the statute. Woodruff v. Fisher, 17 Barb. (N. Y.) 224 (1853).

In establishing drainage districts, the court to whom the power is delegated, derives its jurisdiction from the statute alone. No presumption arises to support its action in any particular. Every essential fact must be affirmatively shown by the record in order to give the court jurisdiction. Payson v. People, 175 Ill. 267, 51 N. E. 588 (1898); Illinois Cent. R. Co. v. Hasenwinkle, 232 Ill. 224, 83 N. E. 815, 15 L. R. A. (N. S.) 129 (1908); Spring Creek Drainage Dist. v. Highway Commissioners, 238 Ill. 521, 87 N. E. 394 (1909); Morgan Creek Drainage Dist. Comm'rs v. Hawley, 240 Ill. 123, 88 N. E. 465 (1909); Drummer Creek Drainage Dist. v. Roth, 244 Ill. 68, 91 N. E. 63 (1910).

In establishing drainage districts, the county court derives its jurisdiction from the statute and no presumption can arise to support its action in any particular, and only those lands can be included therein or added thereto which the statute provides may be so included or added. People ex rel. Croft v. Karr, 244 Ill. 374, 91 N. E. 485 (1910).

Drainage commissioners derive their powers from the statute and must strictly follow the statute, hence meeting outside the territory of the district, unless allowed by statute, is void. People ex rel. Cline v. Camp, 243 Ill. 154, 90 N. E. 215 (1909).

In levying an assessment, the commissioners must strictly pursue the powers granted by statute, and where the statute provides for an estimate by the commissioners of the amount necessary to maintain a drain for the ensuing year, and thereupon to levy assessment for that amount, an assessment which includes moneys to be raised for other purposes is void. McDougall v. Bridges, 52 Wash. 396, 100 Pac. 835 (1909).

As to delegation by legislature of power to commissioners, see note III, B. 2, to Chicago B. & Q. R. Co. v. Board of Supervisors of Appanoose County, *post*, p. 459.

II. Substantial Compliance.

The law providing for formation of reclamation district must be substantial-

KINNE, J. But two questions need be considered on this appeal: First, when was jurisdiction obtained over the subject-matter of the action; and, second, if jurisdiction once attached, could the power of the board to act be defeated by any subsequent action on part of a part of the petitioners, by their protesting or remonstrating or withdrawing their names from the petition, so as to reduce the number of petitioners below the one hundred required by the statute? The law, in reference to the establishment of drains, levees, ditches, and water courses is found in chapter 2 of title 10 of the Code of 1873, and in chapter 186 of the Acts of the Twentieth General Assembly. As amended, the statute requires that "whenever the petition of one hundred legal voters of the county, setting

ly complied with before there is any power to assess the land. Assessment cannot be sustained on the ground that the district is a *de facto* corporation. Reclamation Dist. No. 537 of Yolo County v. Burger, 122 Cal. 442, 55 Pac. 156 (1898).

In order to justify assessment there must have been a substantial compliance with the law in forming the district. Reclamation Dist. No. 537 v. Burger, 122 Cal. 442, 55 Pac. 156 (1898).

As to disregarding slight irregularities see note VI to Chapman & Dewey Land Co. v. Wilson, vol. 2, this series.

III. Immaterial How Proceedings Start.

The enactment of the legislature peremptorily ordering the imposition of local taxes for the accomplishment of local purposes does not depend for its validity upon the question whether it was based upon the petition of a majority or less than a majority of the citizens to be affected by it, or without a petition from any, or merely upon the general knowledge of the legislature. Slack v. Marysville & L. R. Co., 52 Ky. (13 B. Mon.) 26 (1852); Cyprus Pond Draining Co. v. Hooper, 59 Ky. (2 Met.) 350 (1859).

As to it being immaterial at whose instance proceedings are commenced, see note VII to Campbell v. Youngson, vol. 2, this series.

IV. Jurisdiction—When Vests.

Jurisdiction to create a drainage district is to be determined from the petition when filed, and cannot be affected by the attempted withdrawal of certain of the signers thereof. Seibert v. Lovell, principal case.

The jurisdiction to establish a drainage district is to be determined from the petition when it was filed, and without regard to subsequent acts of the parties thereto. The jurisdiction attaches upon the filing of the petition and therefore certain of the parties thereto cannot defeat the formation of the district by withdrawing their names from the petition. Sim v. Rosholt, 16 N. Dak. 77, 112 N. W. 50, 11 L. R. A. (N. S.) 372 (1907).

The fact that some of the freeholders signed a petition under misapprehension of its effect, such not appearing on the face of the paper, does not render it ineffective to confer jurisdiction. Hinkley v. Bishopp, 152 Mich. 256, 114 N. W. 676 (1908).

V. Jurisdiction from Situs of Land.

The jurisdiction of a justice of the peace in drainage matters is determined by the location of the land or the rights thereon that it is supposed to impair. It is wholly immaterial in what county the lands which it is desired to drain, lie. It is only to those over which it is sought to construct the ditch that the

forth that any body or district of land in said county * * * is subject to overflow; or too wet for cultivation; and that in the opinion of petitioners the public health, convenience or welfare will be promoted by draining or leveeing the same, and also a bond * * * shall be filed with the county auditor, he shall appoint a competent engineer or commissioner who shall proceed to examine said district of lands, and if he deem it advisable to survey and locate such ditches, drains, levees, embankments and changes in the direction of water courses as may be necessary for the reclamation of such lands or any part thereof. * * *" Section 2, c. 186, Acts Twentieth General Assembly. After the commissioner files his

jurisdiction relates, and therefore when lands sought to be drained lie in one county and those over which the drainage ditch will run in another county, the justice of the latter county has jurisdiction. Lile v. Gibson, 91 Mo. App. 480 (1901).

VI. Disqualification of Commissioner.

Owning property within the district is not a disqualification to act as commissioner of the district. People ex rel. Chapman v. Sacramento Drainage District, 155 Cal. 373, 103 Pac. 207, p. 107, this volume.

Authority in drainage commissioners to pass upon the question of the enlargement of a district is to a limited extent, to have the question determined by an interested tribunal, but the interest is so small and insignificant that the law does not regard it. Scott v. People ex rel. Lewis, 120 Ill. 129, 11 N. E. 408 (1887).

That one of the drainage commissioners owned land within the district is not a disqualification. The legislature could grant the right upon any condition that it saw fit to impose. The tribunal to whom the power is delegated may be given unqualified authority in respect thereto so long as it proceeds within its appropriate sphere. None of the rules disqualifying judges or jurors have any application to such a situation. State ex rel. Dorgan v. Fiske, 15 N. D. 219, 107 N. W. 191 (1906).

VII. Must Find Jurisdictional Facts.

A petition in the form and by the parties required by law is necessary to vest jurisdiction in supervisors to form a district. Reclamation Dist. No. 537 v. Burger, 122 Cal. 442, 55 Pac. 156 (1898).

Unless the requirements of the statutes are complied with, supervisors can obtain no jurisdiction in the matter of organizing a drainage district. Where the statute requires it, a petition by a majority of the residents interested in the improvement is essential and the supervisors must find the petition was signed by the requisite number. If the record fails to show this, they have acquired no authority to act, as the existence of facts upon which jurisdiction wholly depends will not be presumed. Richman v. Board of Supervisors of Muscatine County, 70 Iowa 626, 26 N. W. 24 (1885).

Before a ditch can be established it is necessary that the supervisors or other body to whom the authority is delegated determine that such ditch is demanded by or will conduce to the public health or welfare. State ex rel. Witte v. Curtis, 86 Wis. 140, 56 N. W. 475 (1893).

Unless a general law for drainage of wet lands makes proper provision for determination in each proceeding of the question whether the particular ditch or system of drainage will be a public utility or promote the public health, welfare and convenience, it is unconstitutional

report showing the necessity for the improvement, the probable cost, etc., it is provided that "the county auditor shall immediately thereafter, cause notice in writing to be served on the owner of each tract of land along the route of the proposed levee, ditch, drain or change in the direction of such water course, who is a resident of the county, of the pendency and prayer of such petition, and the session of the board of supervisors at which the same will be heard, which notice shall be served ten days prior to said session." Code, § 1208. By section 1209 of the Code it is provided that the supervisors, at the session set for such hearing, shall, if they find the preceding section to have been complied with,

and void. Gifford Drainage Dist. v. Shroer, 145 Ind. 572, 44 N. E. 636 (1896).

VIII. Discretion Not Arbitrary.

The discretion given commissioners in the assessment of lands is not an arbitrary one, but a discretion in determining what lands are benefited and the extent thereof, and if they include in their assessment lands which clearly are not benefited, they exceed the authority vested in them. People ex rel. More v. County Court of Jefferson County, 51 Barb. 136 (1867).

IX. Reconsidering Action.

The board of commissioners may reconsider its action in finding that a drain will be for the benefit of the public, and find that it will not be so, if no rights of third persons have intervened. State ex rel. Sullivan v. Ross, 82 Neb. 414, 118 N. W. 85 (1908).

X. Withdrawal of Petitioners.

Up to the final order establishing the district, withdrawal may be allowed by the court upon application and such terms as may be just. In re Central Drainage Dist., Cush v. Krunschke, 134 Wis. 130, 113 N. W. 675 (1907).

It seems that on principle, an initial promoter of the organization of a drainage district should not be absolutely bound to stand therefor after the coming in of the report of the commissioners in case of his having reasonable ground in the judgment of the court for withdrawing his support. It may well be that such a person cannot capriciously or unreasonably withdraw and thereby prevent the consummation of the enterprise, to the prejudice of others concerned as petitioners or commissioners. In re Central Drainage Dist., Cush v. Krunschke, 134 Wis. 130, 113 N. W. 675 (1907).

Jurisdiction attaches when the petition is filed and cannot be devested by certain of the petitioners withdrawing or remonstrating after it is filed, having the effect to reduce the number of the petitioners below that required by the statute. Richman v. Board, 70 Iowa 627, 26 N. W. 24 (1885); 77 Iowa 513, 42 N. W. 422, 14 Am. St. Rep. 308, 4 L. R. A. 445 (1889); Seibert v. Lovell, 92 Iowa 507, 61 N. W. 197.

The act of signing a petition for the formation of a district is not irrevocable, and may be revoked at any time before the jurisdiction of the body authorized to act has been determined by it. Mack v. Polecat Drainage Dist., 216 Ill. 56, 74 N. E. 691 (1905).

A petitioner has the absolute right to withdraw up to the time of judicial action upon the petition. In re Central Drainage Dist., Cush v. Krunschke, 134 Wis. 130, 113 N. W. 675 (1907).

XI. Dismissing Proceedings.

The board of supervisors to whom authority to establish a drainage district is delegated has no authority to

hear and determine the petition; and if they find such improvement necessary, and no application shall have been filed for damages as provided in the next section, shall proceed to locate and establish such improvement. Provision is made for the payment of damages in case they are claimed. It appears that prior to the time the remonstrances were filed in this case about five hundred dollars had been expended in making the survey and report touching the proposed improvement. There is no question that the petition as presented to the auditor contained the requisite number of petitioners, nor is it questioned that at the time the board acted upon the matter enough of the petitioners had protested and remon-

dismiss proceedings except as it shall find some fatal defect or irregularity in the proceedings, or shall find the work is not one of public utility, etc. Temple v. Hamilton County, 134 Iowa 706, 112 N. W. 174 (1907).

Proceeding must be dismissed if it be found that the work will not benefit the public health, or benefit the public or the landowners beyond its cost. Bryant v. Robbins, 74 Wis. 608, 43 N. W. 507 (1889).

XII. No Jurisdiction to Fix Damages.

The only legal method by which a property owner may be deprived of his property for public use is by having his damages assessed by a jury duly selected, impaneled, and sworn, and acting under the direction of a court of competent jurisdiction, and a statute providing for ascertainment of damages by commissioners is void. Wabash Railroad Co. v. Drainage Commissioners, 194 Ill. 310, 62 N. E. 679 (1901); Juvinall v. Jamesburg Drainage Dist., 204 Ill. 106, 68 N. E. 440 (1903); Michigan Central R. Co. v. Spring Creek Drainage Dist., 215 Ill. 510, 74 N. E. 696 (1905).

The provision in the drainage act authorizing a court to impanel a jury in drainage proceedings without notice to or participation by the owners of the land condemned, and that where the court so ordered commissioners may assess damages and benefit in lieu of a jury, are void, and contravene the constitutional provision requiring compensation for private property taken for public use to be ascertained by a jury. Wabash & R. Co. v. Coon Run Drainage & Levee Dist., 194 Ill. 310, 62 N. E. 679 (1901); Smith v. Claussen Park Drainage & Levee District, 229 Ill. 555, 82 N. E. 278, vol. 2, this series.

The provision of the Illinois Statute for assessing damages by a jury or by commissioners is unconstitutional and void. The compensation and damages can only be ascertained by a jury. Hull v. Sangamon River Drainage District, 219 Ill. 454, 76 N. E. 701, *post*, p. 459.

As to trial of question of damages and compensation by jury or commissioners, see note II, D, to Chicago B. & Q. R. Co. v. Board of Supervisors of Appanoose County, *post*, p. 593.

XIII. Power Continuing One.

The legislature may, after providing for an assessment against all property benefited to the full extent of benefits received from the construction of a ditch, authorize additional assessments from time to time to cover expense of maintaining and keeping the ditch in repair. The power to specially assess is coextensive with the benefits received. It is a continuing one and may be exercised to cover the expense of maintaining such improvement. McMilanet v. Board of Comm'rs of Freeborn County, 93 Minn. 76, 100 N. W. 384 (1904).

XIV. To Change System.

The system of drainage may be changed by commissioners, and an additional

strated against granting the prayer of the petitioners to reduce the number of petitioners below the legal number in case said remonstrants and protestants should be treated as no longer petitioners. From the foregoing statutes and facts it is clear that the petition was signed by the requisite number of legal voters of the county, and that such a petition was requisite in order to confer jurisdiction. Now, the record shows that the board found as a fact that the petition as filed contained the required number of petitioners. That was all that was necessary in order to confer jurisdiction when the finding is fully sustained by the facts, as it is in this case. We hold, then, that the question of jurisdiction is to be determined from the petition as it was when filed, and without regard to the subsequent acts of the petitioners. Richman v. Board, 70 Iowa 630,

assessment to pay the cost thereof levied without a new classification of the lands or notice thereof. Reynolds v. Milk Grove Special Drainage Dist., 134 Ill. 268, 25 N. E. 516 (1890).

XV. To Use Old Ditch.

The proposed district may be over the line of a ditch previously established and constructed. Drebert v. Trier, 106 Ind. 510, 7 N. E. 223 (1886); Hardy v. McKinney, 107 Ind. 364, 8 N. E. 232 (1886); Rodgers v. Venus, 137 Ind. 221, 36 N. E. 841 (1894).

Drains are constructed by the public for public purposes, and while the landowners are assessed according to benefits derived, they do not thereby acquire vested rights that will prevent the location and construction of another drain upon the same line. The power is analogous to the power of cities to reconstruct streets, except in the latter case the statute provides that the damages caused by the improvement shall first be paid to the landowner who was assessed for a former improvement. Meranda v. Spurlin, 100 Ind. 380 (1884).

XVI. To Use Natural Stream.

The legislature has power to enact a statute providing that natural streams may be straightened, widened, and deepened for the purposes of drainage. Lipes v. Hand, 104 Ind. 503, 1 N. E. 871 (1885).

XVII. To Build Levees or Impound Debris.

Under an act providing that a drain or drains, etc., for agricultural and sanitary purposes may be constructed across lands of others by giving of notice, etc., with description of starting point, route and terminus, and if it be deemed necessary that a levee or other work be constructed, the same to be stated, and the appointment of the commissioners for the construction of such work pursuant to the provisions of the law. The words "levees or other works" must be taken only in connection with drainage for agricultural and sanitary purposes, and as auxiliary to the drainage of the lands. This is the only construction which will bear the test of the Constitution, otherwise, one owner whose lands are subject to overflow at certain seasons of the year from the river, could set in motion in proceedings for the erection of a levee sufficient to protect his lands, no matter how expensive, and have the cost levied upon the lands of others in the vicinity which the commissioners appointed by the court might deem benefited by the improvement. The work of constructing a great levee along the banks of a river subject to overflow is not embraced within the provisions of the statute and is, therefore, without authority of enabling law. Updike v. Wright, 81 Ill. 49 (1876); O'Brien v. Wheelock, 95 Fed.

26 N. W. 24, and 77 Iowa 513, 42 N. W. 422. So far as affecting the jurisdiction which had already attached was concerned, the protests and remonstrances were of no effect. They were proper to be taken into consideration by the board in passing upon the merits of the petition, but they were not available for any other purpose. It must be remembered that jurisdiction did not attach as of the date when the board acted, but as of the date when the legal petition was filed. The power to act having been conferred upon the board by virtue of a legal petition, it could not be impaired or taken away by the protests, remonstrances, or attempted withdrawals of some of the petitioners. The question requires no further consideration.

883, 37 C. C. A. 309 (1899), affirmed O'Brien v. Wheeler, 184 U. S. 450, 44 L. Ed. 636, 22 Sup. Ct. 345 (1902).

The control of debris from mining or other operations cannot be said to be an incident of drainage so as to come within the provision of an act entitled "An act to promote drainage." People v. Parks, 58 Cal. 624 (1881).

XVIII. Enlargement of Old Ditch.

The fact that a ditch exists which by being enlarged could accomplish the drainage contemplated by a new ditch does not in itself prevent the establishment of the new ditch. Miller v. Weber, 1 Ohio Cir. Ct. Rep. 130 (1885).

The fact that trustees have located one ditch does not exhaust their power of drainage nor confine it to deepening and widening the old ditch. Miller v. Weber, 1 Ohio Cir. Ct. Rep. 130 (1885).

XIX. Division of Tract for Assessment.

An act which provides that commissioners shall assess to each tract of land its proportionate share of the entire cost of the work, does not require that a tract of land shall be divided into the smallest legal subdivision in making the assessment. The more reasonable view is that two or more tracts disconnected should not be valued and assessed together. Spellman v. Curtenrus, 12 Ill. 409 (1851); Moore v. People ex rel. Lewis, 106 Ill. 376 (1883).

XX. Assessment Before Work Completed.

An assessment may be made before the work is completed; as soon as the amount for which the district will be liable is approximately ascertained. Ross v. Supervisors of Wright County, 128 Iowa 427, 104 N. W. 506, p. 358, this volume.

XXI. Power to Assess Strictly Construed.

The proceeding for assessment by commissioners being one in derogation of the common law, the act conferring the authority should be liberally construed in favor of the landowners. People ex rel. More v. County Court of Jefferson County, 51 Barb. (N. Y.) 136 (1867).

As to the power to include various classes of land, such as public lands, lands uncovered by recession of lakes, lands in more than one county, lands requiring distinct systems of drainage, public highways, municipal corporations, railroad rights of way, lands drained by nature, lands partially drained, high and dry lands, dominant and servient lands, lands the majority of which are drained, see note IV, to Hull v. Sangamon River Drainage District, *post*, p. 593.

As to the conclusiveness of the decision of commissioners, etc., see note to Chapman & Dewey Land Co. v. Wilson, vol. 2, this series.

It is insisted that we should so construe the law as to require that petitioners should reside near, or be interested in, the proposed improvement. To do so would be to make law, not to construe it. The statute contains no such restriction. All that is required is that one hundred legal voters of the county shall petition in order to set the machinery of the law in motion. We cannot override the plain provisions of the statute. If the law is defective in this respect, and the rights of citizens not properly protected, resort must be had to the legislature for relief. The decision of the district court was right, and its judgment is affirmed.

As to waiver of irregularities in action of commissioners, etc., see note II to Smith v. Claussen Park Drainage & Levee District, vol. 2, this series.

As to necessity of giving notice of proceedings, of what proceedings notice is necessary, and of effect of failure to give notice, see note to Ross v. Board of Supervisors of Wright County, *post*, p. 358.

As to power to include land in more than one district, see note III, A, to Hull v. Sangamon River Drainage District, *post*, p. 600.

As to power to change boundaries of district, see note II, H, to Hull v. Sangamon River Drainage District, *post*, p. 599.

As to power to form sub-districts, see note III, B, to Hull v. Sangamon River Drainage District, *post*, p. 600.

VAN NESS v. ROONEY et al.

[Supreme Court of California, June 6, 1911; rehearing denied July 6, 1911.]

— Cal. —, 116 Pac. 392.

1. Mining Location—Title Acquired.

A mining location secures a good title in the locator, without a patent, so long as there has not been a subsequent location based on his failure to do assessment work.

2. Public Domain—Patent—Mineral Lands.

A patent for land granted to a railroad company expressly excluding and excepting all mineral lands except coal and iron lands, is held to grant only lands nonmineral, the exception being construed as part of the description.

3. Same—Railroad Grants.

Mineral lands situated within railroad grants are subject to location as mining claims up to the time of the issuance of the patent to the railroad company.

4. Same—Unknown Mineral Deposits.

A patent to land as agricultural land transfers to the patentee all mineral deposits within its boundaries not known to exist at the time of the patent.

5. Same—Known Mineral Deposits.

Mineral deposits whose existence is known do not pass under a patent issued for land subject to disposal or sale.

6. Same—Mining Claim—Quieting Title.

One in possession of a mining claim under a valid location prior to the issuance of a patent to a railroad company is the equitable owner, entitled to have his title quieted as against the patentee asserting ownership therein.

In Bank. Appeal from the Superior Court, Los Angeles County, Frank R. Willis, Judge.

Action to quiet title by H. J. Van Ness against John Rooney and others, Judgment for plaintiff. Defendants appeal. Affirmed.

For appellants—D. J. Hall and Taylor & Tebbe.

For respondent—Braynard & Kimball.

LORIGAN, J. This action was brought by plaintiff against defendants to quiet his title to a quartz mining claim, known as the "Five Pines Mine," located in Trinity County, and for an injunction restrain-

NOTE.

As to nature of property in a mining claim, see note to Arnold v. Goldfield Third Chance Mining Co., vol. 3, this series. As to right of possession of mining claim, see note to Dwinnell v. Dyer, vol. 3, this series.

ing defendants from trespassing on or extracting ore therefrom. Plaintiff proved a valid location of the mine by one Edwin Baker, on August 26, 1895, and a conveyance by said locator to plaintiff; that the claim consisted of a piece of land 1,500 feet long by 600 feet wide located partly in section 20 and partly in section 29, township 35 north, range 1 west, M. D. M., about half the surface ground of said claim lying in each of said sections; that the annual work and labor required by law to be done had been performed on said claim each year after its location, and that the claim embraced valuable gold-bearing ore, and contained no deposits of coal or iron.

The defendants asserted title to that portion of the mining claim located in section 29 as successors in interest, under a patent issued by the United States, to the Central Pacific Railroad Company, dated February 14, 1896. This patent purported to convey to said railroad company some 200,000 acres of land in various sections, townships, and ranges in California, including all of said section 29. The descriptive calls in the patent are followed by the granting clause, whereby the United State grants to the Central Pacific Railroad Company "all the tracts of land described in the foregoing, yet excluding and excepting all mineral lands should any such be found in the tracts aforesaid, but this exclusion and exception according to the terms of the statute shall not be construed to include coal and iron lands."

Judgment was entered in favor of plaintiff, declaring him to be the owner and entitled to the possession of the mining ground in question against everyone, except the government of the United States; that defendants had no right or title to any part thereof, and enjoined them from trespassing upon the property. Defendants moved for a new trial, which being denied, this appeal is taken solely from the denial of said order.

The judge of the superior court of Trinity county, Hon. J. W. Bartlett, before whom this cause was tried, in ordering judgment for plaintiff filed a written opinion in which he set forth so clearly the questions involved in the suit, with accurate declarations of law bearing on them, that we quote from it extensively.

After referring to the facts, as we have recited them above, including the terms of the patent to the railroad company and the exceptions contained therein, the opinion of said superior judge proceeds:

"What, if any, is the effect of the exception and reservation above set forth in said patent as determinative of the issues involved in this case. Plaintiff's claim is that by virtue of this exception and reservation no title passed by the patent to that portion of the 'Five Pines Mine' which lies within that portion of said section 29 of township 35 north, range 7

west, M. D. M., to which defendants allege title. Defendants claim that plaintiff is debarred from making this claim by reason of the provisions of the Act of Congress of March 2, 1896 [chapter 39, 29 Stat. 42 (U. S. Comp. St. 1901, p. 1603)], which prohibits the bringing of actions by the United States to annul patents theretofore erroneously issued under railroad or wagon road grants, after five years from the time of the passage of said act of congress; that this action is an unauthorized attack upon a United States patent, and that if plaintiff was ever in a position to question the validity of the passing under said patent of the title to said section 29 he has lost his rights by not bringing his action within five years from the time the patent was issued. Defendants also claim that the excepting clause is inserted in the patent without any authority of law, and is void and of no effect.

"These questions are of momentous importance, for on their proper solution depends the validity of titles of locators on much of the mineral lands in the mining districts of Trinity County and in other of the mining counties of the State of California. While a great number of authorities on questions relating to the scope and effect of patents issued by authorized officers of the government of the United States were cited in the argument of counsel at the trial of this action, none have been presented, and after much research this court has not as yet found any decision of United States Supreme Court, federal court, or state supreme court, clearly or directly determining the questions urged by defendants, and in this action it is compelled to solve those matters largely through a construction and application of the United States statutes governing the transfers of public lands and those governing the locating and holding of mining claims situate on the public domain.

"From its inception it has been the policy of the United States government to retain the mineral lands of the United States for mining purposes, and not to allow title to them to pass to pre-emptors, homesteaders, timber applicants, grantees under wagon road or railroad grants, or in any case, save where patents were secured in pursuance of the provisions pemitting the purchase directly of mineral lands. This is evidenced by all the statutes of the United States relating in any way to the disposal of public lands, by the requirements in final proofs when made by claimants for any variety of land, and by various resolutions of the Congress of the United States, declaring that mineral lands were not intended to be granted under the guise of grants in aid of the construction of wagon roads and railways. In the recitals of the patent involved in the case at bar, it is specified that the act under which the patent is issued does not pass mineral lands, and the exception and reservation in question indicate that the officers authorized to make disposition of

the lands by patent were desirous of preserving for the people of the United States any mineral lands that might be found in the large portion of the public domain which was being given for all time into the hands of a private corporation.

"By the mining statutes of the United States passed in 1866 [Act July 26, 1866, c. 262, 14 Stat. 251], the right of entering upon and locating and appropriating lands valuable for their mineral deposits was conferred upon every citizen of the United States, and those who might declare their intention to become such citizens. By the discovery of mineral and marking of boundaries and compliance with such rules as local mining districts or state legislatures might enact, not to conflict with the United States laws, the locator of a quartz mining claim was given the exclusive right to the possession of the lands and the mineral therein contained within the boundaries of his claim. Only one condition was imposed upon him, and that was in every calendar year he must perform in work and labor and improvements upon his mine at least $100 in value. If he did not do this, he was liable to lose his mine, in the event some other qualified locator made a location of the claim before the original locator had resumed work. His claim did not become forfeited to the government because of failure to do the work, as he could resume operations and rely upon his original title by location at any time before another had located. Under these mere locations, much of the valuable mining lands of the United States has been held and worked, and is still held and worked, and the title kept alive by the required work in each year has always been regarded as a perfectly safe and secure title. No provision has ever been enacted compelling any miner to patent his claim, and time and again these locations have been held to have all the effect and incidents of a grant from the government. As said by the Supreme Court of the United States in Forbes v. Gracey, 94 U. S. 767 [24 L. Ed. 313]:

" 'Mining claims on public land are property in the fullest sense of the word.' In the case of Gwillim v. Donnellan, 115 U. S. 49 [5 Sup. Ct. 1112 (29 L. Ed. 348)], the same court holds: 'A valid location of mineral lands, made and kept up in accordance with statute, has the effect of a grant by the United States of the right of present and exclusive possession of lands located.'

"Mineral lands situated within the limits of railroad grants are subject to location up to the time of the issuance of the patent, clearly determined in the great case of Barden v. Northern Pac. R. Co., 154 U. S. 288 [14 Sup. Ct. 1030, 38 L. Ed. 992] by the Supreme Court of the United States, and this court is the final arbiter of all the questions arising in cases like the one before this court, and this decision alone

precludes this court from finding that plaintiff's grantor was not entitled to this land when the patent under discussion was executed to the Central Pacific Railroad Company.

"The argument of defendants that plaintiff is debarred from the relief he seeks because of the provisions of the act of Congress of March 2, 1896, is wholly without merit. Plaintiff is not seeking in this action to annul or avoid a patent issued by the government of the United States. The effect of granting the relief he asks does not in any way invalidate the patent in question. It is an interpretation of the instrument that will be brought about by the judgment in this action, which will determine what, if any, lands in section 29 of township 35 north of range 7 west, M. D. M., are included in the reserving clause of the patent. It is safe to presume that when the President of the United States was about to sign the patent, if it had been called to his attention that there was on said section 29 a quartz claim which has been duly located, which was being worked, which had defined bounds, or could be identified and defined, that he would have refused to sign the patent until these lands had been expressly excepted. But to except such lands it was not necessary for him to know that an actual location had been made. That could be an actual fact, as in this instance it was, without the knowledge reaching the land department or the president prior to the issuance of the patent. By virtue of such location, and because of the mining statutes, and by reason of the interpretation made by the Supreme Court of the United States as to the effect of such location, the lands embraced in the location had passed into the possession and control of the locator; his location had as effectually given him a right to the possession of the located claim, as if it had been granted to him by the Government of the United States.

"The moment the locator discovered a valuable mineral deposit on the lands and perfected his location in accordance with law, the power of the United States government to deprive him of the exclusive right to the possession and enjoyment of the located claim was gone; the lands had become known mineral lands, and they were exempted from lands that could be granted to any railroad company. On August 25, 1895, a lode had been found to exist on the section in controversy in this action, mineral lands had been found in one of the tracts mentioned in the patent, and by force of the reserving clause therein these lands never passed from the government by reason of the patent.

"The case of Noyes v. Mantle, 127 U. S. 348, 8 Sup. Ct. 1132, 32 L. Ed. 168, is most convincing that such is the construction that should be placed on the reservation in the patent. In this case the Supreme Court of the United States says: 'Where a location of a vein or lode has been

made under the law and its boundaries have been specifically marked on the surface so as to be readily traced, and notice of the location is recorded in the usual books of record within the district, we think it may safely be said that the vein or lode is known to exist, although personal knowledge of the fact may not be possessed by the applicant for a patent of a placer claim. The information which the law requires the locator to give to the public must be deemed sufficient to acquaint the applicant with the existence of the vein or lode. A copy of the patent is not in the record, so we cannot speak positively as to its contents; but it will be presumed to contain reservations of all veins or lodes known to exist pursuant to the statute. At any rate, as already stated, it could not convey property which had already passed to others. A patent of the United States cannot, any more than a deed of an individual, transfer what the grantor does not possess.'

"Plaintiff's predecessor in interest having duly located the Five Pines mine, before the issuance of the patent here in question, that portion of said mine which lies within the west half of the northwest quarter of section 29 of township 35 north of range 7 west, M. D. M., must be held to be not included in the lands conveyed by the patent to the Central Pacific Railroad Company because of the reservation contained in the granting clause of the patent, and judgment in this action should be in favor of the plaintiff, as prayed for in his complaint."

The affirmance of this appeal might be rested upon the legal principles announced in this opinion of the trial judge and further consideration of the matter made unnecessary, if it were not that some points and authorities cited by appellant here are to be noticed, as well as some decisions, other than those referred to by the trial judge, to be cited.

The principal claim of the appellants is that the patent of the government to the railroad company was conclusive of the fact that the land was such as was patentable under the grant; that, as land which was mineral in character (save coal and iron lands) could not be granted, the issuance of the patent, accompanied by the presumption that the land department had done its duty, conclusively established that the lands as described in the patent were nonmineral in character, and the exception and reservation of mineral land contained therein amounted to nothing.

As a general proposition, and as applied to the disposition of its public lands by the Government of the United States, the rule contended for by appellants is undoubtedly true. The land department is vested with special power to determine the claims of different persons to public lands it is authorized to dispose of. The duty is cast upon it to determine the character of the public lands, as to whether it is mineral land reserved under the provisions of the general law from sale, or agricultural or

other land of which it may make disposition. The determination of this question of the character of the land being given to the land department, the general rule is that the issuance of a patent is a conclusive determination that the land is agricultural, or such other character as might be disposed of under the general law providing for the disposition of public lands, and not mineral land reserved from sale, and the effect of the issuance of a patent to the land as agricultural land is to transfer to the patentee all mineral deposits which may be subsequently discovered within its boundaries, but which were not known to exist at the time the patent was issued. While this is the general rule as to vesting in the patentee of agricultural land the title to all mineral deposits the existence of which were unknown when the patent was issued, the rule is equally established that mineral deposits known to exist in the land at the time the patent was issued do not pass under it. In this state this was held to be the rule in cases involving patents issued to railroad companies under the same general act of congress making such grants, and which explicitly excluded and excepted from the operation thereof grants of mineral lands, and with similar express exclusion and exception in a patent as to mineral land, should any be found in the premises granted.

The first case (McLaughlin v. Powell, 50 Cal. 64) was ejectment; plaintiff deraigning title under a patent of the United States to the Western Pacific Railroad Company of California, issued in 1870. This patent, as does the one here, excluded and excepted mineral land, should any be found to exist on the tracts described in the patent. Defendant offered to prove that portion of the land described in the patent and of which plaintiff sought to recover possession was mineral land, and that he had held it as a mining claim since 1866. The trial court refused to permit him to do so, and the court, reversing the cause for this refusal, said: "The exception contained in the patent introduced by the plaintiff is part of the description, and is equivalent to an exception of all the subdivisions of the land mentioned which were 'mineral' lands. In other words, the patent grants all of the tracts named in it which are not mineral lands. If all are mineral lands, it may be that the exception is void; but the fact cannot be assumed, as by its terms the exception is limited to such as are mineral land, and does not necessarily extend to all the tracts granted. We think the defendant should have been allowed to prove that the demanded premises were mineral lands."

In Chicago Quartz M. Co. v. Oliver, 75 Cal. 194, 16 Pac. 780, 7 Am. St. Rep. 143, the action was brought by plaintiff to quiet its title to a quartz mining claim to which the defendant asserted title as successor in interest under a patent issued to the Central Pacific Railroad Com-

pany in 1870, and which patent contained a provision, as in the patent involved here, excepting and excluding all mineral land, should any be found in the patented premises. The trial court found that the Chicago Quartz Mining Company's quartz mine was valuable gold-bearing mineral land, and had been notoriously known and frequently worked as such ever since 1861, and thereupon made a decree in favor of plaintiff, quieting its title. On appeal here, the same point was made as is urged now, that the patent was conclusive, and not subject to collateral attack. In affirming the judgment, this court discussed the acts of congress under which these grants to the railroad company were made, and the duty of the land department relative to issuing patents thereunder. In connection therewith, it said: "In the original act (granting lands to railroads in aid of the construction of their roads) all mineral lands are expressly excepted from its operation, and in the amendatory act it is enacted that the grant shall not include mineral lands, or any lands returned and denominated as mineral lands. 'Whatever is included in the exception is excluded from the grant; and it therefore often becomes important to ascertain what is excepted, in order to determine what is granted.' Leavenworth, etc., R. R. Co. v. U. S., 92 U. S. 733 [23 L. Ed. 634]. It is not claimed that the officers on whom was devolved the duty of issuing the patents to the lands granted could add anything to the grant. But it is claimed that the patent is conclusive evidence that the grant included all the land covered by the patent. The Supreme Court of the United States has said: 'A patent may be collaterally impeached in any action, and its operation as a conveyance defeated, by showing that it had no jurisdiction to dispose of the lands; that is, the law did not provide for selling them, or that they had been reserved from sale or dedicated to special purposes, or had previously been transferred to others.' Smelting Co. v. Kemp, 104 U. S. 636 [26 L. Ed. 875]. This is quoted approvingly in the opinion of the court, delivered by Field, J., in Wright v. Roseberry, 121 U. S. 488 [7 Sup. Ct. 985, 30 L. Ed. 1039]." And following the rule announced in McLaughlin v. Powell, *supra*, it was held that such a patent only grants lands which are nonmineral in character; that the exception of mineral lands in the patent is part of the description and equivalent to an exception therefrom of all lands that were mineral, and that the Chicago Quartz Mining Company had a right to show that the land that it claimed was known mineral land at the time of and long prior to the issuance of the patent to the railroad company, and was land within the exception in the patent.

Aside from the cases in our court dealing particularly with patents under grants of congress to railroad companies, the rule appears to be general that mineral deposits do not pass under a patent issued for land

subject to disposal or sale where, at the time of the issuance of the patent, such mineral deposits are known to exist. Reynolds v. Iron Silver Min. Co., 115 U. S. 687, 6 Sup. Ct. 601, 29 L. Ed. 774; Davis' Adm'r v. Weibbold, 139 U. S. 507, 11 Sup. Ct. 628, 35 L. Ed. 238; Kansas Min. & Mill. Co. v. Clay, 3 Ariz. 326, 29 Pac. 9; Loney v. Scott (Or.), 112 Pac. 173.

In Reynolds v. Iron Silver Min. Co., *supra*, a patent was granted for a placer mine within the boundaries of which, when the patent was issued, a quartz mine was known to exist. Speaking of the effect of the grant to the placer claim patentee under this circumstance, the court said: "He (the placer claim patentee) takes his surface land and his placer mine, and such lodes or veins of mineral matter within it as were unknown, but as to such as were known to exist he gets by that patent no right whatever. The title remaining in his grantor, the United States, to this vein, the existence of which was known, he has no interest in it as authorizes him to disturb any one else in the peaceable possession and mining of that vein. When it is once shown that the vein was known to exist at the time he acquired title to the placer, it is shown that he acquired no title or interest in that vein by his patent. Whether the defendant has title or is a mere trespasser, it is certain that he is in possession, and that it is a sufficient defense against one who has no title at all, nor ever had one." It was therefore held that no title to the quartz ledge passed to the placer claim patentee, but the title thereto remained in the United States Government. In the case of Davis' Adm'r v. Weibbold, *supra*, it was likewise held that as to known mineral land no title passed to the patentee. And to the same effect are the other authorities referred to by us.

Certain California cases are cited by appellant under which they claim that the patent to the railroad company is conclusive against the attack of respondent. These are particularly: Gale v. Best, 78 Cal. 235, 2 Pac. 550, 12 Am. St. Rep. 44; Saunders v. La Purisima, etc., Co., 125 Cal. 159, 57 Pac. 656; Paterson v. Ogden, 141 Cal. 43, 74 Pac. 443, 99 Am. St. Rep. 31; and Jameson v. James, 155 Cal. 275, 100 Pac. 700. But an examination of these cases shows that the attack on the patent was made by junior claimants. As to such claimants, it is clear as pointed out in those authorities, that the patent to the land as agricultural land is conclusive.

But the plaintiff here is not a junior claimant. He had made a valid mining location and initiated his title to his mining claim in the quarter section in question nearly six months before the issuance of the patent to the railroad company, and, as the law is that mineral deposits whose existence are known when the patent is issued do not pass under it, the

patent was ineffectual to transfer any title to the appellants as to the mining claim of the respondent.

As to the right of the respondent to have his title quieted as against defendants we have no doubt. Respondent was in possession of his mining claim under a valid location made prior to the issuance of the patent under which appellants claim, and was therefore in privity with the United States. He is the equitable owner of the mining claim, and while the government holds the legal title it holds it in trust for him, to issue a patent therefor, if he should elect to obtain one upon his complying with the provisions of the law entitling him to such issuance. Under such circumstances, while respondent's title to the mining claim is only an equitable one, and though the legal title is in the government, he is entitled to have such equitable title quieted against appellants who, though they acquired no title whatever to the mining claim of respondent under the patent to the railroad, are nevertheless asserting title to it against respondent.

The order appealed from is affirmed.

We concur: HENSHAW, J.; MELVIN, J.

LOWER TULLE RIVER DITCH CO. v. ANGIOLA WATER CO.

[Supreme Court of California, July 26, 1906.]

149 Cal. 496, 86 Pac. 1081.

1. **Water Rights—Appropriation—Conducting through Natural Channels.**

A person who is making an appropriation of water from a natural source or stream is not bound to carry it to the place of use through a ditch or artificial conduit, or through a ditch or canal cut especially for that purpose. He may make use of any natural or artificial channel or natural depression which he may find available and convenient for that purpose, and his appropriation so made will, so far as such means of taking is concerned, be as effectual as if he had carried it through a ditch or pipe line made for that purpose and no other.

2. **Appropriation—Head Gate Not Essential to.**

It is unnecessary that there should be any head gate of board or masonry at the place of diversion if a simple cut will accomplish the purpose.

3. **Diversion of Water—Drainage of Other Land, Effect of.**

The purpose of draining one tract of land does not destroy the right to take water for the irrigation of other tracts.

CASE NOTE.

Transporting Water Appropriated in Dry Ravines, Gulches, Hollows, and Natural Channels, etc.

I. In General.

An appropriation of water depends upon the actual capture of the water in its application to some beneficial use or purpose, and not upon the mode or means by which it is appropriated or carried. McCall v. Porter, 42 Or. 49, 56, 70 Pac. 820, 71 Pac. 976 (1902).

If one prevents a stream from overflowing its banks at low places by means of dams or dikes, thus confining it within the channel and carrying it down to his land, where he uses it for necessary and reasonable irrigation, this is a valid appropriation and carriage of the water so confined. McCall v. Porter, 42 Or. 49, 56, 70 Pac. 820, 71 Pac. 976 (1902).

II. In Dry Ravines, Gulches, Hollows or Natural Channels.

While water must be diverted from its natural channel by means of a ditch or other structure to effect a valid appropriation, after the diversion any dry ravine, gulch, hollow in the land or natural channel may be used for the purpose of transporting the water the whole or a portion of the distance to the point where it is to be applied to the land.

California.—Hoffman v. Stone, 7 Cal. 46, 4 Mor. Min. Rep. 520 (1857); Merced Min. Co. v. Fremont, 7 Cal. 317, 7 Mor. Min. Rep. 313, 68 Am. Dec. 270 (1857); Butte Canal & Ditch Co. v. Vaughn, 11 Cal. 143, 4 Mor. Min. Rep. 552, 70 Am. Dec. 769 (1858); Nevada & S. Canal Co. v. Kidd, 37 Cal. 282, 315 (1869); Creighton v. Kaweak

4. Appropriation—Posting Notice, Not Necessary.

In order to make a valid appropriation of water it is not necessary to post and record a notice of appropriation as provided in the Civil Code, as the method of acquiring the right to use the water as therein described is not exclusive.

5. Prior Appropriation—Outside of Code Provision—Rights Acquired.

A person may by prior actual and completed appropriation and use, without proceeding under the code, acquire a right to the water for his beneficial use which will be superior and paramount to the title of one making subsequent appropriation from the same stream in the manner provided by the code.

Appeal from the Superior Court of Kings County on order denying motion for new trial. Affirmed.

For appellant—Charles G. Lamberson.

For respondent—H. Scott Jacobs, and Bradley & Farnsworth.

The court found in effect that plaintiff was seised of a prior right, as against the defendant, to divert from Tulle River, a stream of the water thereof amounting to a continuous flow of twenty-three feet per second, and gave judgment enjoining the defendant from interfering therewith. Neither party is a riparian owner of the stream, both claiming solely

Canal & Irr. Co., 67 Cal. 221, 7 Pac. 658 (1885); Lower Tulle River Ditch Co. v. Angiola Water Co., 149 Cal. 496, 86 Pac. 1081 (1906).

Colorado.—Platte Valley Irr. Co. v. Buckers M. & I. Co., 25 Colo. 77, 53 Pac. 334 (1898).

Idaho.—Malad Valley Irr. Co. v. Campbell, 2 Idaho 411, 18 Pac. 52 (1888).

Oregon.—Simmons v. Winters, 21 Or. 35, 27 Pac. 7, 28 Am. St. Rep. 727 (1891); McCall v. Porter, 42 Or. 49, 56, 70 Pac. 820, 71 Pac. 976 (1902).

Utah.—Herriman Irr. Co. v. Butterfield Min. Co., 19 Utah 453, 57 Pac. 537, 51 L. R. A. 930 (1899).

Washington.—Miller v. Wheeler 54 Wash. 429, 103 Pac. 641 (1909).

This is said to be a new doctrine, extended where the riparian rule has been considered inapplicable or applicable only to a limited extent, to local conditions. See Concord Mfg. Co. v. Robertson, 66 N. H. 1, 6, 25 Atl. 718 (1890).

It would be a harsh rule requiring those engaged in the enterprise of transporting water for irrigation purposes to construct an actual ditch along the whole route through which the waters are carried, and to refuse them the economy that nature occasionally affords in the shape of a dry ravine, gulch or canyon. Hoffman v. Stone, 7 Cal. 46, 4 Mor. Min. Rep. 520 (1857).

III. In Ditch of Another.

Water appropriated may be transported in the ditch of another person or company, and where this transportation is by agreement, the right is a continuing easement. Chicosa Irr. Ditch Co. v. Elmore Ditch Co., 10 Colo. App. 276, 50 Pac. 731 (1897); Water Supply & Storage Co. v. Larimer & W. Irr. Co., 24 Colo. 322, 51 Pac. 496 (1897). See Wyatt v. Larimer & Weld Irr. Co., 18 Colo. 298, 33 Pac. 144 (1893); Lehi Irr. Co. v. Moyle, 4 Utah 327, 9 Pac. 867 (1886); Northpoint Consol. Irr. Co. v. Utah & S. L. Canal Co., 16 Utah 246, 52 Pac. 168 (1898). Thus it has been held that where parties with the knowledge and consent of the owners of a ditch, work upon and enlarge and assist in enlarging and widening and

by appropriation and use. The claim of defendant is based on a notice of appropriation under the code, posted on August 27, 1897, and a subsequent diversion and use in pursuance thereof. With respect to the plaintiff's claim, the finding is in effect that it is founded on an appropriation and use made by N. P. Duncan, plaintiff's grantor, in May, 1897. The sole objection presented on this appeal is that the evidence is insufficient to show a diversion and use by Duncan prior to the posting of defendant's notice of appropriation, or to show that such diversion was made with the intent and purpose to apply the water to any beneficial use, or that any beneficial use was made thereof prior to such posting.

We think there is sufficient evidence on these points to uphold the findings and judgment. Duncan was a witness for the plaintiff, and testified in substance that in May, 1897, in order to get water to irrigate his land, he had a cut made in the levee confining the water of the river, thereby diverting the water into an excavation that he had made along the outside of the levee; that he had made use of this excavation, which was for practical purposes a ditch, to conduct the water to his land; that he got the water to irrigate his land at that time, and that by

repairing the same, with a tacit understanding that they are entitled to have the use of the increased volume of water thereafter flowing in the canal, such parties thereby acquire a right and title to the use of such ditch and to take the additional volume of water therefrom. Lehi Irr. Dist. v. Moyle, 4 Utah 327, 9 Pac. 867 (1886).

The original proprietors of a canal, by standing by and seeing the parties working upon the ditch and increasing its capacity and enlarging and improving it, and allowing them to make rods of new ditch and accepting it as part of the main ditch, are estopped by their course and conduct from denying to such parties the use of the increased volume of water the improved ditch will carry. See Dickerson v. Colgrove, 100 U. S. 578, 580, 25 L. Ed. 618 (1879); Fabian v. Collins, 3 Mont. 215, 229, 5 Mor. Min. Rep. 20 (1878); Lehi Irr. Co. v. Moyle, 4 Utah 327, 9 Pac. 867 (1886). But where water is transported through a ditch that is used in common with others, a party will not be entitled to divert from the ditch more than his proportionate amount of the water flowing therein. McPhail v. Forney, 4 Wyo. 556, 35 Pac. 773 (1894).

Where a person finds an abandoned ditch already constructed upon public land, and utilizes it for the appropriation of water from a stream for domestic purposes and for irrigation, he thereby acquires a title in the ditch superior to all others, if said rights are not lost by abandonment. Utt v. Frey, 106 Cal. 392, 39 Pac. 807 (1895). Under such circumstances, however, the subsequent user of the ditch for transporting appropriated water will not be permitted to enlarge the ditch beyond its original capacity as against the objection of parties claiming the land under patent from the United States. Jattun v. O'Brien, 89 Cal. 57, 26 Pac. 635 (1891).

IV. In Another Stream.

Quaere whether one can bring waters from another or independent source into a natural source the waters of which have been appropriated, and use the channel of such stream to conduct the waters thus brought in to another point,

means of it he irrigated about two sections of his land for the purpose of growing thereon wild grasses and feed. H. Clawson also testified that he saw the water in May, 1897, running from the river through the cut in the levee, and that the water thus taken was used during that season to irrigate all of Duncan's land, together with lands of others, amounting in the aggregate to somewhere near four thousand acres. There was no evidence offered in contradiction of this testimony.

This was sufficient proof of the intent, the diversion or appropriation, and the beneficial use prior to the posting of the defendant's notice. A person who is making an appropriation of water from a natural source or stream is not bound to carry it to the place of use through a ditch or artificial conduit, nor through a ditch or canal cut especially for that purpose. He may make use of any natural or artificial channel or natural depression which he may find available and convenient for that purpose, so long as other persons interested in such conduit do not object, and his appropriation so made will, so far as such means of conducting the water is concerned, be as effectual as if he had carried it through a ditch or pipe line made for that purpose and no other.

to be there diverted and used, suggested, but not decided. Malad Valley Irr. Co. v. Campbell, 2 Idaho 411, 18 Pac. 52 (1888).

An appropriator of water may turn it into a natural stream and conduct the water thus appropriated in that stream to the point where he desires to use it for irrigation purposes. Hoffman v. Stone, 7 Cal. 46, 4 Mor. Min. Rep. 520 (1857); Richardson v. Kier, 37 Cal. 263 (1869); Ellis v. Tone, 58 Cal. 289 (1881); Wilcox v. Hausch, 64 Cal. 461 (1884); Wutchumna Water Co. v. Pogue, 151 Cal. 105, 90 Pac. 262 (1907).

The California laws provide that an appropriator of water may turn it into a natural channel or another stream and mingle with the waters thereof and then reclaim them; but in reclaiming, the waters of the stream already appropriated must not be diminished. Kerr's Cal. Cyc. Civil Code, § 1413.

In Richardson v. Kier, 37 Cal. 263 (1869), the defendant had appropriated waters for purposes of irrigation and turned them into a natural channel which ran through the defendant's farming lands and formed a connecting link in the system of carriage.

In the case of Ellis v. Tone, 58 Cal. 289 (1881) the water was taken from the south and middle forks of the Mokelmne River and turned into the Calaveras River above the head of Morman Slough and carried down the river so as to be taken out at Morman Slough and used for irrigation.

Where the proprietors of a ditch used a natural channel, dry at certain seasons of the year, as a connecting link between two canals constructed by them, emptying their water by one canal into the channel and subsequently dividing them by means of a dam into the other canal, this arrangement was sustained by the court. Hoffman v. Stone, 7 Cal. 46, 4 Mor. Min. Rep. 520 (1857).

V. In Lower Part of Same Stream.

After water has been diverted from its natural channel by means of a ditch or other structure, the lower portion of such stream from which the water is taken may be used for purposes of transporting the water appropriated in conducting it to the point where it is

(Hoffman v. Stone, 7 Cal. 49; Butte C. & D. Co. v. Vaughan, 11 Cal. 150 [70 Am. Dec. 769]; Simmons v. Winters, 21 Or. 35 [28 Am. St. Rep. 727], 27 Pac. Rep. 9; McCall v. Porter, 42 Or. 56, 70 Pac. 822; Richardson v. Kier, 37 Cal. 263.) For the same reasons it is unnecessary that there should be any head gate of boards or masonry at the place of diversion. If a simple cut will accomplish the purpose of diverting the water from the stream, it is, if accompanied with a beneficial use, a good appropriation as against others making a subsequent diversion and use. There was some testimony indicating a dual intent on the part of Duncan, that is, a purpose not only to get water to irrigate his land, as stated, but also to draw off the flood water from and prevent it flowing to some other land owned by him on which he then had growing a crop of grain. This purpose to drain one tract of land did not vitiate or destroy the right to take the water for irrigation of other tracts, nor impair the right, acquired by such appropriation and use, to take and use it for the latter purpose. The two purposes are not inconsistent.

In order to make a valid appropriation it was not necessary for Duncan to post and record a notice of appropriation as provided in the Civil

to be applied. Simmons v. Winters, 21 Or. 35, 27 Pac. 7, 28 Am. St. Rep. 727 (1891).

An appropriator of the water of a natural main stream has the right to conduct such water to a point on a lower branch of the stream and there permit it to flow down the natural channel of the branch of the stream to the point where he takes it out to put upon his land. Wutchumna Water Co. v. Pogue, 151 Cal. 105, 90 Pac. 362 (1907).

Since the passage of the Act of Congress of July 26, 1866, c. 262 (14 Stat. at Large 251; U. S. Comp. Stat. 1901, p. 1437), the prior appropriator of water is entitled to right of way for conveying water along its natural channel. Ennor v. Raine, 27 Nev. 213, 74 Pac. 2 (1903).

VI. Abandonment—When Occurs.

Water diverted, discharged into a natural channel without any intention of reclaiming it, is abandoned, and becomes part of the natural stream. Davis v. Gale, 32 Cal. 26, 28, 4 Mor. Min. Rep. 604, 91 Am. Dec. 554 (1867); Barkley v. Tieleke, 2 Mont. 59, 4 Mor. Min. Rep. 666 (1874); Schultz v. Sweeny, 19 Nev. 359, 11 Pac. 253, 3 Am. St. Rep. 888 (1886). See Macomber v. Godfrey, 108 Mass. 219, 11 Am. Rep. 349 (1871); Wyman v. Hurlburt, 12 Ohio 81, 40 Am. Dec. 461 (1843).

A person or ditch company appropriating water taking advantage of a dry ravine to conduct the water a portion of the distance does not thereby abandon the water thus carried by it, and is entitled to the same rights, use and enjoyment as if conducting it through an artificial ditch. Hoffman v. Stone, 7 Cal. 46, 4 Mor. Min. Rep. 520 (1857); Merced M. Co. v. Fremont, 7 Cal. 317, 325, 7 Mor. Min. Rep. 313, 68 Am. Dec. 270 (1857); Butte Canal & Ditch Co. v. Vaughn, 11 Cal. 143, 150, 4 Mor. Min. Rep. 552, 70 Am. Dec. 769 (1858); Nevada & S. Canal Co. v. Kidd, 37 Cal. 282, 315 (1869). And a person developing water who turns it into a stream does not thereby abandon it, but may take it out again lower down on the natural stream with a proper allowance for seepage and evaporation. Herriman Irr. Co. v. Keel, 25 Utah 96, 69 Pac. 719 (1902).

Code (§§ 1415-1721). The method of acquiring a right to the use of water as there prescribed is not exclusive. One may, by a prior actual and completed appropriation and use, without proceeding under the code, acquire a right to the water beneficially used which will be superior and paramount to the title of one making a subsequent appropriation from the same stream in the manner provided by statute. (Wells v. Mantes, 99 Cal. 583 [34 Pac. 324]; De Necochea v. Curtis, 80 Cal. 401, 20 Pac. 563 [22 Pac. 198]; Watterson v. Saldunbehere, 101 Cal. 112 [35 Pac. 432]; Burrows v. Burrows, 82 Cal. 564 [23 Pac. 146]; Taylor v. Abbott, 103 Cal. 423 [37 Pac. 401]; McGuire v. Brown, 106 Cal. 672 [39 Pac. 1060]; Cardoza v. Calkins, 117 Cal. 112 [48 Pac. 1010]; McDonald v. Bear River, etc. Co., 13 Cal. 238; Kimball v. Gearhart, 12 Cal. 29; Kelly v. Natoma W. Co., 6 Cal. 105; Hill v. King, 8 Cal. 336; Hoffman v. Stone, 7 Cal. 46.)

The judgment and order are affirmed.

SLOSS, J., and ANGELLOTTI, J., concurred.

VII. Reception of Water.

Where water from an artificial ditch is turned into a natural water course and mingled with natural water of the stream for the purpose of conducting it to another point to be there used, the water is not thereby abandoned, but may be taken out and used by the party thus conducting it, provided that in so doing he does not diminish the quantity of the natural flow of the stream to the injury of any other person. Butte Canal & Ditch Co. v. Vaughn, 11 Cal. 143, 4 Mor. Min. Rep. 552, 70 Am. Dec. 769 (1858); Paige v. Rocky Ford Canal & Irr. Co., 83 Cal. 84, 94, 21 Pac. 1102, 23 Pac. 875 (1890).

Persons bringing waters from another source and emptying them into the stream the waters of which have already been appropriated, with the intention of taking such waters out again, have a right to divert the quantity thus emptied into the stream, less such amount as might be lost by evaporation and other like causes. Burnett v. Whiteside, 15 Cal. 35 (1860); Paige v. Rocky Ford Canal & Irr. Co., 83 Cal. 84, 94, 21 Pac. 1102, 23 Pac. 875 (1890); Buckers Irr. Mill. & Imp. Co. v. Farmers' Independent Ditch Co., 31 Colo. 62, 72 Pac. 49 (1902).

Compare Druley v. Adam, 102 Ill. 177 (1882), in which it is held that no matter how water is first brought to a natural stream and allowed to flow therein and mingle with the waters thereof, such water is thereby abandoned after it has entered the lands of another.

One conducting waters into a stream from a foreign source is not permitted to divert the same from the stream unless he shows that he has not taken more than he turned in. Wilcox v. Hausch, 64 Cal. 361, 3 Pac. 108 (1884); Herriman Irr. Co. v. Butterfield Min. & Mill. Co., 19 Utah 453, 57 Pac. 537, 51 L. R. A. 930 (1899); Herriman Irr. Co. v. Keel, 25 Utah 96, 115, 69 Pac. 719 (1902).

Where the evidence shows that more water is turned into the branch stream than is taken out from it at the point of diversion, it cannot be said that the diversion was a mere appropriation of the natural waters flowing in such channel. Wutchumna Water Co. v. Pogue, 151 Cal. 105, 90 Pac. 362 (1907).

MANSFIELD GAS CO. v. ALEXANDER.

[Supreme Court of Arkansas, January 2, 1911.]

— Ark. —, 133 S. W. 837.

1. Mineral Lease—Reasonable Time for Exploration Implied.

A long term mineral lease is construed to imply a covenant for exploration within a reasonable time, and continued operation thereafter, notwithstanding an express provision for prospecting on adjacent territory within a year.

2. Same—Forfeiture for Delay.

Equity may declare a forfeiture of a mineral lease for breach of an implied covenant to explore and operate within a reasonable time.

Appeal from Scott Chancery Court, J. V. Bourland, Chancellor.

Action to cancel a mineral lease by W. R. Alexander against the Mansfield Gas Company. Decree for plaintiff. Defendant appeals.

Affirmed.

For appellant—Youmans & Youmans.

For appellee—Read & McDonough.

FRAUENTHAL, J. This was an action instituted by the appellee to cancel a mineral lease which by due and proper assignment by the lessee had been transferred to the appellant. The lease was executed on March 8, 1901, by the lessor, who was the owner of the land, in consideration of $1 and the covenants therein contained. By its terms it leased the lands therein described for a term of 50 years for the purpose of mining, boring, and operating lead, zinc, coal, gas, oil, and other minerals and gave to the lessee the exclusive right to prospect for and mine said minerals during the continuance of the term of the lease. It gave to the lessee the right to erect all necessary buildings and make ways of ingress and egress upon the premises to carry on the business of doing said prospecting and mining, and the right to have possession whenever the lessee was ready to commence operation. In event the lessee was successful in obtaining said minerals on the land the lessee agreed to pay to the lessor

NOTE.

On the question of forfeiture as affected by provision for the payment of rent, see note to Marshall v. Forest Oil Co., 21 Mor. Min. Rep. 179.

a certain per cent. of the value of such minerals; and in event of a failure to obtain any minerals by reason of such operations it was provided that the lessee should have the right to remove all buildings and machinery placed by it on the land. It was also provided that if the lessee failed "to begin work toward prospecting and developing on these lands or other lands within four miles of these above described within the period of one year from the date hereof, then these presents and everything contained therein shall cease and be forever null and void."

It appears from the testimony that the appellant owned a large number of similar leases from different persons in this section, upon some of which it had made a little development in obtaining gas. It bored three or four wells within a mile and one-half of the land in controversy and within one year from the date of said lease; but it made no search for any gas or minerals on the land in question, and made no development of any nature thereon. Some years prior to the institution of this suit the appellee demanded of appellant that it make search and operation of his said land for said minerals, but appellant refused to comply with such demand, and indicated that it would not make any search or development until it should determine that it would be profitable to appellant to do so. In the meanwhile it had developed gas in some other fields which was sufficient to serve appellant's needs and purposes. The chancery court found that the appellant and its grantor had failed and refused to develop the leased lands in any way or manner by boring, mining, or operating for any of the minerals mentioned in the lease, and refused to permit it to be done by others; and that by reason of its failure to develop the lands for said purposes, or to permit it to be done by others, appellant "had forfeited said lease." It thereupon entered a decree canceling said lease.

In deciding whether or not the lower court was right in entering a decree canceling said lease we think it only necessary to determine whether or not the appellant and those from whom it obtained the lease have failed and refused to perform the covenants imposed upon them by the lease under such circumstances as to work a forfeiture thereof; for equity may enforce a forfeiture of a contract of lease giving the exclusive right to explore for minerals upon a tract of land where it would be inequitable to permit the lessee longer to assert such right by reason of his continued default. The respective rights of the parties must be determined by the respective obligations which they assumed by virtue of the contract of lease and by the manner in which they have performed or failed to perform those obligations. What then were the mutual obligations entered into by the execution of this lease? The contract was made for the mutual benefit of the parties. The purpose of the lease was not to make a grant of the land or to transfer any estate therein. It

only gave a right to the lessee to search for minerals and an interest in the minerals when so found and taken out. The consideration moving to the lessor for the execution of the lease was not the nominal sum of $1 mentioned therein, but was obviously the royalties upon the minerals which should be discovered and taken from the land. The lessor was to obtain a certain percentage of the minerals that would be thus discovered and mined. And this was the only real benefit that would accrue to him from the execution of the lease; this was his sole compensation. The only way in which he could obtain this compensation and benefit would be by the exploration of the land and discovery of the minerals thereon. With the view of obtaining such benefit the lessor executed the lease, relying on the lessee to make such explanation and obtain such minerals. That was the evident purpose of the execution of the lease. The lease was not executed for speculative purposes, but for present benefits or for benefits to be obtained within a reasonable time, and the lessee must have so understood the contract because it gave no other hope of compensation to the lessor therefor.

There was therefore an implied covenant in the lease on the part of the lessee to search for, and, if found, to obtain the minerals from the land. "Although the lease is silent, the law implies a condition on the part of the lessee for diligent exploration, development and operation in good faith, and whatever is necessary to the accomplishment of that which is expressly contracted to be done under an oil or gas lease is part of the contract although not specified, and when so incorporated by implication is as effectual as if expressed." 27 Cyc. 728. And the general rule for the construction of mineral leases, such as is involved in this case, is that the law implies a covenant upon the part of the lessee to make the exploration and search for the minerals in a proper manner and with reasonable diligence and to work the mine or well when the mineral is discovered so that the lessor may obtain the compensation which both parties must have had in contemplation when the agreement was entered into.

In the case of Ray v. Natural Gas Co., 138 Pa. 576, 20 Atl. 1065, 12 L. R. A. 290, 21 Am. St. Rep. 922, in speaking of such a lease, the court said: "Whilst the obligation on the part of the lessee to operate is not expressed in so many words it arises by necessary implication. * * * If a farm is leased for farming purposes, the lessee to deliver to the lessor a share of the crops in the nature of rent, it would be absurd to say because there was no express engagement to farm that the lessee was under no obligation to cultivate the land. An engagement to farm in a proper manner and to a reasonable extent is necessarily implied." And this principle is peculiarly applicable to the character of lease involved in this case; and the implied covenant on the part of the lessee to make diligent search and operation of the land must be performed in order to

keep such a lease in existence and to avoid its forfeiture. In speaking of such character of leases Mr. Thornton in his work on The Law Relating to Oil and Gas, § 127, says: "It is the duty of the lessee to make diligent search and operation of the leased premises, and it is not necessary that a provision for such search or operation be inserted in the lease; for it is an implied covenant in every oil and gas lease that a diligent search and operation will be prosecuted. And where the only consideration was the royalty, a failure on the part of the lessee to commence operations for eight months was held to be an abandonment."

The plain object of such leases is that there will be a diligent search made on the leased land for the minerals and if discovered a diligent operation thereof. By this lease an exclusive right to make such search and to mine the discovered product was given to the lessee for a long term of years. The sole compensation of the lessor was in the royalties which he might receive, and if there was no product, there was no benefit to the lessor. In the case of Huggins v. Daley, 99 Fed. 606, 40 C. C. A. 12, 48 L. R. A. 320, there was before the court a lease giving the right of exploration and development of the land for minerals to the lessee. In that case the court said: "Where the sole compensation to the landowner is a share of what is produced, there is always an implied covenant for diligent search and operation. There is perhaps no other business in which prompt performance is so essential to the rights of the parties or delays so likely to prove injurious. * * * Where the only consideration is prospective royalty to come from exploration and development, failure to explore and develop renders the agreement a mere *nudum pactum* and works a forfeiture of the lease; for it is of the very essence of the contract that work should be done. * * * No such lease should be construed as to enable the lessee who has paid no consideration to hold it merely for speculative purposes, without doing what he stipulated to do, and what was clearly in the contemplation of the lessor when he entered into the agreement."

In the case of Maxwell v. Todd, 112 N. C. 677, 16 S. E. 926, the court construed a mineral lease which gave the lessee an exclusive right to explore a tract of land for a long term of years and to take therefrom the minerals that might be discovered, paying to the lessor a part of the proceeds received from such minerals. There was no stipulation in the lease that it would be forfeited for a failure to explore the land or to take the minerals that might be discovered therefrom. In that case the court held that "the law will construe the contract as if such a stipulation had been expressly written therein, and will adjudge such lease to be forfeited if within a reasonable time the lessee fails to carry out the purpose of the lease."

In the construction of mineral leases such as is involved in this case, the authorities uniformly held that there is an implied obligation on the part of the lessee to proceed with the search and also with the development of the land with reasonable diligence according to the usual course of such business, and that a failure to do so amounts in effect to an abandonment and works a forfeiture of the lease. Petroleum Co. v. Coal, Coke & Mfg. Co., 89 Tenn. 381, 18 S. W. 65; Conrad v. Morehead, 89 N. C. 31; Oliver v. Goetz, 125 Mo. 370, 28 S. W. 441; Island Coal Co. v. Combs, 152 Ind. 379, 53 N. E. 452; Aye v. Philadelphia Co., 193 Pa. 451, 44 Atl. 555, 74 Am. St. Rep. 696; Rawlings v. Armel, 70 Kan. 778, 79 Pac. 683; Price v. Block, 126 Iowa, 304, 101 N. W. 1056; Cowan v. Radford Co., 83 Va. 547, 3 S. E. 120; Guffy v. Hukill, 34 W. Va. 49, 11 S. E. 754, 8 L. R. A. 759, 26 Am. St. Rep. 901; Bay State Petroleum Co. v. Penn. Lubricating Co., 121 Ky. 637, 87 S. W. 1102. The lease involved in this case gave to the lessee the exclusive right to prospect for minerals upon the land described therein and to take therefrom the minerals that might be discovered; it gave this exclusive right for a period of 50 years and it did not specify any time when the search or the development should be made on the land thus leased. The sole compensation which the lessor was to receive for the execution of the lease was a certain per cent. of the value of the minerals that should be mined. According to the uniform holding of the authorities the law will read into this lease a covenant on the part of the lessee that it will with due and proper diligence search the land described in the lease for minerals and will with due and proper diligence develop the same. This implied covenant is in effect a condition upon which the lease was made; a failure or refusal to perform that condition results in a forfeiture of the lease.

But it is urged that the lease expressly provides that a failure to prospect and develop on these lands or on other lands within four miles thereof within one year from the date of the lease would work a forfeiture thereof; and that this express provision for a forfeiture excludes any implied forfeiture for any other reason. It is true that when such a lease expressly provides when and how the search for the minerals shall be made upon the leased lands, then there can be no reason for implication relative thereto, and such provision expressly made must control. But in the case at hand the lease did not expressly provide when the exploration and development of the leased land should commence. The compensation which the lessor would receive could only come from a development of mines upon his own land. The exploration of and securing gas from adjoining land instead of being a benefit would actually result in an injury to his land, because it would tend to tap and take from his land the gas thereon. The plain purpose of the lease was that

the lessee should develop the land of the lessor, and this proviso only named the time and place when and where the operations should begin for the work of prospecting and development. In event no such provision had been in the lease, the law would have implied that the lessee agreed to begin such operations within a reasonable time. But where in such leases there is no stipulation as to when and how the development shall continue, then the law also implies that the lessor covenanted to prosecute the operations with due and proper diligence after beginning same. It will not be sufficient to simply begin, but the operations must also continue. Now, in this provision of the lease, there is nothing said about the continuation of the prosecution of the work of search and development upon the land; it solely provides for the beginning of such work. There is no stipulation in the lease indicating when and how the work shall be continued after it is begun. If the lessee under this provision had bored one well on the leased land or on other lands within four miles thereof within one year from the date of the lease and had found no oil, gas, or other mineral, it would have complied with all that this provision required, although it then ceased all further operations. But such was clearly not the intent or purpose of this lease. In this proviso it only named when and where the work toward prospecting and development should begin, but it did not provide that the exploration and development should continue on the other lands situated within four miles of the leased land. Nor did it provide that after having begun such exploration or development within one year from the date of the lease it could then cease all operation and still hold the lease. Nothing is herein stipulated as to when or where the prosecution of this work should be made after it was thus begun. We conclude that the proper construction of the lease is that the lessee covenanted that, after having begun the work of prospecting and developing on the leased land or on other lands within one year from the date of the lease, it would then continue a diligent search and operation of the land described in the lease.

In Thornton on Law Relating to Oil and Gas, § 141, it is said: "A cessure of work will operate as a termination of a lease by abandonment, especially where the first or second well proves to be a dry one. * * * So, too, if he (the lessee) is to begin the development of the leased premises by a certain time, he must prosecute the work in the manner in which the business is ordinarily carried on, and with ordinary diligence until the search for oil or gas is ended, either by finding it and thereafter operating the premises, or by demonstrating that there is no oil or gas and surrendering the lease."

The appellant was not bound by the lease to begin the work of prospecting upon the leased land. It had the right to begin such work on

that land or on other land within four miles thereof and within one year from the date of the lease. But after having thus begun the work it had no right then to quit without surrendering the lease. By the implied covenants of this lease it was then bound to continue its search and operation upon the lands described in the lease. It was then bound to operate on this land or quit, it could not after having begun the work of search and operation on other land then fail to search and operate on the leased land. It was bound then to continue its search and development on the leased land, or quit and surrender the lease. Steelsmith v. Gartlan, 45 W. Va. 27, 29 S. E. 978, 44 L. R. A. 107; Munroe v. Armstrong, 96 Pa. 307. The chancellor found that the appellant and its grantor did not continue the work of prospecting and developing on the lands mentioned in the lease with due and proper diligence, and that it failed and refused to do this for such a length of time as to work a forfeiture of the lease. This finding we think is supported by the evidence. For eight years prior to the institution of this suit appellant has failed to continue the search and development of the appellee's land, and in effect has refused to prosecute any operations on this land, although it claims that it does not intend to abandon the lease. Its protracted delay and long-continued failure to do the things contemplated by the lease and which the law implies it covenanted to do, is equivalent to an abandonment of the lease by it. The chancellor we think was therefore right in entering a decree canceling the lease.

The decree is affirmed.

CHARLTON v. KELLY.

[Third Division. Fairbanks, 1905-1906.]

No. 373.

2 Alaska 532.

1. Mining Claims—Essentials of Location.

The regulations prescribed by law to make a valid location of a mining claim in Alaska are: (1) Discovery of mineral upon or within the ground located; (2) marking of boundaries upon ground so that they may be readily traced; (3) recording of notice within ninety days from discovery.

2. Same—Order of Acts of Location Immaterial.

The order in which acts of location are done is immaterial, provided they are all completed before rights of others have intervened.

3. Same—Discovery after Other Acts.

It is not essential that discovery precede or coexist with demarcation of boundaries before recording of notice.

4. Same—Validates Location.

Discovery subsequent to marking the boundaries and recording of notice perfects location unless bona fide rights have intervened.

CASE NOTE.

The Necessity for and Effect of Discovery of Mineral on Mining Location.

5. Same—Location—What Sufficient to Support Ejectment.

Until all three acts of location are performed, no title passes to claimant sufficient to maintain ejectment unless he has marked boundaries and recorded notice and is in actual possession, attempting in good faith to make discovery.

6. Same—Marking Boundaries.

Claim must be so distinctly marked upon the ground that boundaries can be readily traced.

7. Same—Stakes at Corners.

Setting stakes at each corner of a claim and at the center of end line is not necessarily a proper marking.

8. Same—Condition of Country.

The question of whether boundaries are sufficiently marked upon the ground depends somewhat upon the conformation of the ground and the surrounding conditions. What might be sufficient in the case of a comparatively level and fair surface, might not necessarily meet the requirements of the law in a hilly or brushy country. Where the country is broken or the view from one stake or monument to another is obstructed by intervening timber or brush, it may be necessary to blaze trees along the line or cut away the brush or set more stakes at such distance that they may be seen from one to another in a way to indicate the lines.

9. Same—Question of Fact.

The question of what is a sufficient marking of boundaries is not one for the court; but it is to be determined by the jury from the evidence and from the topography of the ground in question whether or not a sufficient marking of the boundaries of the claim has been made so that the same could be readily traced by a person making a reasonable effort to do so.

10. Same—What Sufficient.

Stakes set at each corner of the claim, with center stake at each end, with reference to some other natural object or permanent monument in the locality, such as another well-known claim, is a sufficient compliance with the requirements of the statute.

I. Scope of Note.

In nearly all of the mining states, statutes supplementary to the acts of congress, providing certain essentials to a valid discovery, and requirements in addition to those of the federal law, have been enacted,—such as the doing of certain work within a certain time; work of a certain value; the sinking of a shaft to a certain depth; the finding of a well-defined crevice showing mineral-bearing rock in place; the disclosing of one wall of the vein, etc. This note will not treat of these peculiar local statutes, except in so far as they serve to explain or illustrate general principles or show the construction of the federal law on the subject. It may be said, however, that an observance of the requirements of these local statutes, when not in conflict with the federal law, is as necessary as the observance of the requirements of the federal law itself; and the same may be said of the rules and regulations of the local mining district wherein the location is made.

II. Discovery Is Essential.

A. In General.

The discovery of a vein or lode within the limits of a lode claim is essential to a valid location of the claim.

United States. Jackson v. Roby, 109 U. S. 440, 3 Sup. Ct. 301, 27 L. Ed. 990 (1883); Erhardt v. Boaro.

11. Same—Sufficiency of Location Notice.

Absolute technical strictness in the preparation of a notice of location is not required.

12. Same—Object of Notice.

The object of notice of location is to prevent swinging of claim or change of boundaries, and to guide subsequent locator and afford him information as to extent of claim.

13. Same—Discovery Essential.

Mere marking of boundaries and posting a recording of notice of location, give no title to locator, nor do they constitute possession.

14. Same—Sufficiency of Discovery.

Discovery is sufficient where the mineral found is such that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine, and the facts within the observation of the discoverer and which induce him to locate should be such as would justify a man of ordinary prudence, not necessarily a skilled miner, in the expenditure of time and money in the development of the property.

15. Same—Construction of Rule.

When controversy is between two mineral claimants, the rule respecting sufficiency of discovery is more liberal than when it is between a mineral claimant and one seeking to make an agricultural entry.

16. Same—Conjecture Not Sufficient.

To constitute discovery more than mere conjecture, hope, or even indications, is required.

113 U. S. 527, 5 Sup. Ct. 560, 28 L. Ed. 1113 (1885); Gwellem v. Donnellan, 115 U. S. 45, 5 Sup. Ct. 1110, 29 L. Ed. 340 (1885); O'Reilly v. Campbell, 116 U. S. 418, 6 Sup. Ct. 421, 29 L. Ed. 669 (1886); King v. Amy & S. Consol. Min. Co., 152 U. S. 222, 14 Sup. Ct. 510, 38 L. Ed. 419 (1893); Cresman v. Miller, 197 U. S. 313, 25 Sup. Ct. 468, 49 L. Ed. 770 (1905); affirming 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, 98 Am. St. Rep. 63 (1903); North Noonday Min. Co. v. Orient Min. Co., 6 Sawy. 299, 1 Fed. 522 (1880); Van Zandt v. Argentine Min. Co., 2 McC. 159, 8 Fed. 725, 4 Mor. Min. R. 441 (1881); Harris v. Equator Min. Co., 3 McC. 14, 8 Fed. 863 (1881); Jupiter Min Co. v. Bodie Consl. Min. Co., 7 Sawy. 96, 11 Fed. 666 (1881); Cheeseman v. Shreeve, 40 Fed. 787 (1889); Book v. Justice Min. Co. 58 Fed. 106 (1893); Smith v. Newell, 86 Fed. 56 (1898); Shoshone Min. Co. v. Reuter, 87 Fed. 801, 31 C. C. A. 223, 59 U. S. App. 538 (1898); Erwin v. Perego, 93 Fed. 608, 35 C. C. A. 482 (1899), affirming 85 Fed. 904 (1898); Nevada-Sierra Oil Co. v. Miller, 97 Fed. 681 (1899); Uinta Tunnel Min. Transp. Co. v. Ajax Gold Min. Co., 141 Fed. 563, 73 C. C. A. 35 (1905); Lange v. Robinson, 148 Fed. 799, 79 C. C. A. 1 (1906); Re Antediluvian Lode, 8 Land Dec. 602 (1889); In re Independence Lode, 9 Land Dec. 571 (1889); In re Lone Dane Lode, 10 Land Dec. 53 (1890); Waterloo Min. Co. v. Doe, 17 Land Dec. 111 (1893); Etling v. Potter, 17 Land Dec. 424 (1893); In re Winter Lode, 22 Land Dec. 362 (1896); Reins v. Murray, 22 Land Dec. 409 (1896); Reins v. Raunheim, 28 Land Dec. 526 (1899); Bunker Hill, etc. Co. v. Shoshone Min. Co., 33 Land Dec. 142 (1904).

Alaska.—Moore v. Steelsmith, 1 Alaska 121 (1901); Redden v. Harlan, 2 Alaska 402 (1905); Bulette v. Dodge, 2 Alaska 427 (1905).

California.—Page v. Summers, 70 Cal. 121, 12 Pac. 120 (1886); Tuolumne Consl. Min. Co. v. Macher, 134 Cal. 583, 66 Pac. 863 (1901); Miller v. Chrisman, 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, 98 Am. St. Rep. 63 (1903), affirmed 179

17. Same—Mere Indications Not Sufficient.

Mere indications of mineral, however strong, are not sufficient to answer the requirement of the statute as to a discovery.

18. Same—Indications Considered.

Indications of mineral should be considered as to whether it is in such quantity and under such circumstances and conditions as would justify a man of ordinary prudence, not necessarily a skilled miner, in expenditure of time and money in development of the property.

19. Same—Liberal Construction of Statute.

While the statute requires discovery of mineral should be liberally construed in behalf of bona fide locators, the requirement cannot be ignored, and discovery must be of such substantial kind and character as would justify a man of ordinary prudence in expenditure of time and money to develop the property.

20. Same—How Determined.

In determining the sufficiency of discovery, geological and natural conditions of the ground and the surrounding country should be considered.

21. Same—Right of Possession.

A locator who has marked boundaries and recorded notice and entered into actual possession for the purpose of making discovery, is entitled to possession so long as he remains in actual possession, engaged in good faith in labor of making discovery.

22. Same—Temporary Absence from Claim.

Temporary absence from claim for the purpose of purchasing provisions or supplies, with intention to return, is not an abandonment.

U. S. 313, 25 Sup. Ct. 468, 49 L. Ed. 770 (1905); Daggett v. Yreka Min. & Mill. Co., 149 Cal. 357, 86 Pac. 968 (1906).

Colorado.—Wolfley v. Lebanon Min. Co., 4 Colo. 112 (1878); Armstrong v. Lower, 6 Colo. 393 (1882); McGinnis v. Egbert, 8 Colo. 41, 5 Pac. 652 (1884); Johnson v. Young, 18 Colo. 625, 34 Pac. 173 (1893); Michael v. Mills, 22 Colo. 439, 145 Pac. 429 (1896); Buck v. Jones, 18 Colo. App. 250, 70 Pac. 951, 22 Mor. Min. R. 467 (1902).

Dakota.—Golden Terra Min. Co. v. Mahler, 4 Pac. Coast L. J. 405, 4 Mor. Min. R. 390 (Dist. Ct. Dakota, 1879); Golden Terra Min. Co. v. Smith, 2 Dak. 374, 11 N. W. 98 (1881).

Idaho.—Burke v. McDonald, 2 Idaho 646, 2 Idaho (Hasb.) 679, 33 Pac. 49 (1890).

Montana.—Foote v. National Min. Co., 2 Mont. 402 (1876); Hauswirth v. Butcher, 4 Mont. 299, 1 Pac. 714 (1882); Upton v. Larkin, 5 Mont. 600, 6 Pac. 66 (1885); McDonald v. Montana Wood Co., 14 Mont. 88, 35 Pac. 668, 43 Am. St. Rep. 616 (1894); Upton v. Larkin, 7 Mont. 449, 17 Pac. 728, 15 Mor. Min. R. 404 (1888); Davidson v. Bordeaux, 15 Mont. 245, 38 Pac. 1075 (1895); Walsh v. Mueller, 16 Mont. 180, 40 Pac. 292 (1895); McShane v. Kenkle, 18 Mont. 208, 44 Pac. 979, 56 Am. St. Rep. 579 (1896); Sanders v. Noble, 22 Mont. 110, 55 Pac. 1037 (1899); Gemmell v. Swain, 28 Mont. 331, 72 Pac. 662, 98 Am. St. Rep. 570, 22 Mor. Min. R. 716 (1903).

Nevada.—Gleeson v. Martin White Min. Co., 13 Nev. 442, 9 Mor. Min. R. 429 (1878); Overman Silver Min. Co. v. Corcoran, 15 Nev. 147 (1880).

Oregon.—Patterson v. Tarbell, 26 Or. 29, 37 Pac. 76 (1894).

South Dakota.—Marshall v. Harney Peak Tin Min. Mill & Mfg. Co., 1 S. D. 350, 47 N. W. 290 (1890); Sands v. Cruickshank, 15 S. D. 142, 87 N. W. 589 (1901).

Utah.—Muldoon v. Brown, 21 Utah 121, 59 Pac. 720 (1899); Copper Globe Min. Co. v. Allman, 23 Utah 410, 64 Pac. 1019 (1901); Reynolds v. Pascoe, 24 Utah 219, 66 Pac. 1064 (1901); Lock-

23. Same—Possession—Residence Not Required.

A mining claim is possessed by marking boundaries, recording, and making discovery of mineral, etc., a residence on the claim is not required.

24. Same—What Constitutes Possession.

Merely placing tent, tools, and small supply of provisions on a claim does not alone constitute possession thereof.

25. Same—Casual Visits.

Mere casual visits to ground and leaving thereon, unused, tents, tools, and provisions, does not constitute actual possession.

Action in ejectment for possession of mining claim. Verdict for defendants.

For plaintiffs—Heilig & Tozier.

For defendants—McGuire & Sullivan.

WICKERSHAM, District Judge (instructing jury). You are instructed that the mining claim so described by the plaintiffs is covered by a portion of the mining claim so described by the defendants, and that it is the conflicting area which is in dispute in this case. The question,

hart v. Farrell, 31 Utah 155, 86 Pac. 1077 (1906).

Canada (Ontario).—Atty. Gen. of Ontario v. Hargrave, 8 O. W. R. 127, 10 O. W. R. 319 (1907); Re. McDermott & Dreany, Ont. Min. Com. Cas. 4 (1906).

Discovery initiates the right to a mining claim, and the mere posting of a notice that the poster has located a mining claim, made without a discovery or knowledge of existing metal there, is a mere speculative proceeding and confers no right whatever. Erhardt v. Boaro, 113 U. S. 527, 5 Sup. Ct. 560, 28 L. Ed. 1113 (1885).

A mere posting of a notice on a ridge of rocks cropping out of the earth or on other ground, that the poster has located thereon a mining claim, without any discovery or knowledge on his part of the existence of metal there or in its immediate vicinity, would be justly treated as a mere speculative proceeding, and would not itself initiate any right. There must be something beyond a mere guess on the part of the miner to authorize him to make a location which will exclude others from the ground, such as the discovery of the presence of precious metals in the ground, or in such proximity to the location as to justify a reasonable belief in their existence. Erhardt v. Boaro, 113 U. S. 527, 5 Sup. Ct. 564, 28 L. Ed. 1113 (1884); Lange v. Robinson, 148 Fed. 799, 79 C. C. A. 1 (1906).

A valid location of a mining claim must be based upon a discovery, and where the discovery fails the whole claim falls with it. Gwillim v. Donnellan, 115 U. S. 45, 5 Sup. Ct. 1110, 29 L. Ed. 348 (1885).

As a condition precedent to the appropriation of the mineral lands of the United States by such person or persons as are lawfully entitled to make such appropriation, discovery of some of the precious metals therein is necessary. Moore v. Steelsmith, 1 Alaska 121 (1901).

While the statute requiring the discovery of mineral as one of the essential conditions of a valid location of land under the mining laws, should be liberally construed in behalf of bona fide locators,

therefore, for you to determine by your verdict is: Who is the owner and entitled to the possession of the property in dispute in this action?

You are instructed that all valuable mineral deposits in lands belonging to the United States in Alaska are free and open to exploration and purchase by citizens of the United States under the regulations prescribed by law. The regulations that have been prescribed by law in order to make a valid location of a mining claim in the territory of Alaska are: First. A discovery of mineral upon or within the ground to be located. Second. A marking of the boundaries of the property upon the ground, so that the same can be readily traced. Third. The recording of a notice of location within ninety days from the date of the discovery of the claim described in the notice with the recorder of the recording district in which the said property is located. The order in which these acts are to be done is immaterial, provided they all shall have been completed before the rights of others have intervened. It is not essential that the discovery shall precede or co-exist with the demarkation of the boundaries and the recording of the notice of location. The discovery may be made subsequent, and when made operates to perfect the location against the whole world, save those whose bona fide rights have intervened. But you must bear in mind that all three of these acts must

the statutory requirement that discovery shall be made should not be ignored, and the discovery must be of such a substantial kind and character as to convince the jury by a fair preponderance of the evidence that it would justify a man of ordinary prudence, not necessarily a skilled miner, in the expenditure of his time and money in the development of the property. Charlton v. Kelly, principal case.

There can be no valid location without an actual discovery of mineral. Tuolumne Consol. Min. Co. v. Maier, 134 Cal. 583, 66 Pac. 863 (1901).

A valid location must be based upon a discovery of a lode within its limits. The lode is the principal thing granted by the government, the surface ground being merely an incident. Wolfley v. Lebanon Min. Co. of New York, 4 Colo. 112 (1878).

The locator of a mining claim has no title thereto until discovery is made, and a deed thereof before discovery, in consideration of stock in a corporation, is void and without consideration, as it conveys no title. Buck v. Jones, 18 Colo. App. 250, 70 Pac. 951, 22 Mor. Min. R. 467 (1902).

The following instruction, "To make a valid location of a lode mining claim, there must be a discovery within the limits of the claim located of a vein or crevice of quartz of ore with at least one well-defined wall on a lead, lode or ledge of rock in place, containing gold, silver or other mineral deposits," held proper, when considered in connection with other instructions defining and limiting what is meant by a discovery. Upton v. Larkin, 7 Mont. 449, 17 Pac. 728, 15 Mor. Min. R. 404 (1888).

A patent cannot be obtained upon discovery after application therefor. Upton v. Larkin, 7 Mont. 449, 17 Pac. 728, 15 Mor. Min. R. 404 (1888).

Until discovery is made no right of possession to any definite portion of the public mineral lands can ever be initiated. Until that is done the prospector's rights are confined to the ground in

be completed before sufficient title passes from the government of the United States to the claimant of the ground sufficient to maintain an action in ejectment such as this is, except that I instruct you that whenever a claimant of mineral ground in Alaska shall have marked the location thereof by stakes or other permanent monuments, so that the boundaries thereof can be readily traced, and shall have filed with the recorder a notice of the location within ninety days from the date of the discovery of the claim, and shall be in the actual possession of the ground, attempting in good faith to make a discovery thereon, he is as much entitled to the protection of the law and to maintain an action of ejectment, if ousted, as if he had actually made a discovery.

1. Your first inquiry, then will be: Was the location so asserted by the plaintiffs in this action so definitely marked upon the ground and in such a manner that the boundaries could be readily traced prior to the intervention of defendants' rights? This is a question for you

his actual possession. Gemmell v. Swain, 28 Mont. 331, 72 Pac. 662, 98 Am. St. Rep. 570, 22 Mor. Min. R. 716 (1903).

Under the law of congress no valid location of a mining claim can be made until a vein or deposit of gold, silver or metalliferous ore or rock in place has been discovered. Overman Silver Min. Co. v. Corcoran, 15 Nev. 147 (1880).

The facts set forth in the affidavit of discovery must be true; that is, there must have been an actual discovery of valuable mineral. Attorney General of Ontario v. Hargrave, 8 O. W. R. 127, 10 O. W. R. 319 (1907).

The mere staking out of a mining claim without a discovery of valuable mineral is void, and confers no rights. In re McDermott & Dreany, Ont. Min. Com. Cas. 4 (1906).

The burden of proof to show an actual discovery is upon the defendant in an action to determine an adverse claim where the defendant's location rested on an alleged location prior to that of the plaintiff. Sands v. Cruickshank, 15 S. D. 142, 87 N. W. 589 (1901).

B. Presumptions.

Recording the notice and marking the boundaries upon the ground is not sufficient to authorize the court to presume a discovery. In order to defeat a subsequent location, a discovery must be shown. Smith v. Newell, 86 Fed. 56 (1898); Bulette v. Dodge, 2 Alaska 427 (1905).

Discovery will be presumed after a lapse of several years, especially in favor of one holding by purchase from the original locator. Harris v. Equator Min. Co., 3 McC. 14, 8 Fed. 863 (1881); McGinnis v. Egbert, 8 Colo. 41, 5 Pac. 652 (1884).

C. Where Boundaries Are Extended.

Where the boundaries of a claim are extended by an amendment of the location notice, etc., it is not necessary that a new discovery be made upon that portion so added to the claim. Tonopah & Salt Lake Min. Co. v. Tonopah Min. Co., 125 Fed. 389 (1903).

As to amending notice of location and effect thereof, see note to Giberson v. Tuolumne Copper Co., vol. 2, this series.

D. Mexican Law.

Under the Mexican Law, discovery of a mine was necessary, but the mere fact of discovery did not vest title in the discoverer. To obtain title he must have

to determine under all the circumstances in the case, and depends somewhat upon the conformation of the ground and the surrounding conditions. What may be sufficient in the case of a comparatively level and bare surface might not necessarily meet the requirements of the law in a hilly or brushy country.

You are instructed that a claim may be marked upon the ground by stakes or other permanent monuments, but you are instructed that the law requires a claim to be so distinctly marked upon the ground that its boundaries can be readily traced. The requirements of the statute in this respect are not necessarily fulfilled by merely setting stakes at each of the corners of the claim and at the center of the end line, unless the topography of the ground and the surrounding conditions are such that a person accustomed to tracing lines of mining claims can, after reading a description of the claim in the posted or recorded notice of the location or upon the stakes, by a reasonable and bona fide

conformed to the conditions of the mining ordinance as to the presentation of written statement of registry of the mine and the other steps provided by the ordinance to be taken. United States v. Castillero, 67 U. S. (2 Black) 1, 17 L. Ed. 360 (1862).

As to discovery being essential to location of placer claim see the next paragraph of this note.

III. Essential to Placer Location.

A. In General.

An actual discovery of mineral is as essential to a valid placer location as it is to a lode location.

United States.—Jackson v. Roby, 109 U. S. 440, 3 Sup. Ct. 301, 27 L. Ed. 990 (1883); Davis v. Webbold, 139 U. S. 509, 11 Sup. Ct. 628, 35 L. Ed. 238 (1890); Cresman v. Miller, 197 U. S. 373, 25 Sup. Ct. 468, 49 L. Ed. 770 (1905); Nevada Sierra Oil Co. v. Home Oil Co., 97 Fed. 681 (1899); Nevada Sierra Oil Co. v. Home Oil Co., 98 Fed. 673 (1899); Olive L. & Dev. Co. v. Olmstead, 103 Fed. 568, 20 Mor. Min. R. 700 (1900); Steele v. Tanana Mines R. Co., 148 Fed. 678, 78 C. C. A. 412 (1906); Dughi v. Harkins, 2 Land Dec. 721 (1883); Lincoln v. Placer, 7 Land Dec. 81 (1888); Ferrell v. Hoge, 18 Land Dec. 81, 19 Land Dec. 568 (1894); Southern Pacific R. Co. v. Griffin, 20 Land Dec. 485 (1895); Rhodes v. Treas., 21 Land Dec. 502 (1895); Reins v. Murray, 22 Land Dec. 409 (1896); In re Louis Min. Co., 22 Land Dec. 663 (1896); In re Union Oil Co., 23 Land Dec. 222, on review 25 Land Dec. 351 (1896); In re Union Oil Co., 25 Land. Dec. 351 (1897); Reins v. Raunheim, 28 Land Dec. 526 (1899).

Alaska.—Barnette v. Freeman, 2 Alaska 286 (1904).

California.—Miller v. Chrisman, 140 Cal. 440, 73 Pac. 1083, 74 Pac. 448, 98 Am. St. Rep. 63 (1903), affirmed 197 U. S. 313, 25 Sup. Ct. 468, 49 L. Ed. 770 (1905); Weed v. Snook, 144 Cal. 439, 79 Pac. 1023 (1904); New England & Coalinga Oil Co. v. Congdon, 152 Cal. 211, 92 Pac. 180 (1907).

Montana.—Moxon v. Wilkinson, 2 Mont. 421 (1876); McDonald v. Montana Wood Co., 14 Mont. 88, 35 Pac. 668, 43 Am. St. Rep. 616 (1894); Okl. Bay v. Oklahoma Southern Gas, Oil & Min. Co., 13 Okl. 425, 73 Pac. 936 (1903).

Although in some instances courts have questioned the necessity of an actual discovery of mineral upon gold placer ground, it is established by the

effort to do so, find all of the stakes, and thereby readily trace the boundaries. Where the country is broken or the view from one stake or monument to another is obstructed by intervening timber or brush, it may be necessary to blaze trees along the line, or cut away the brush, or set more stakes at such distances that they may be seen from one to the other, in a way to indicate the lines, so that the boundaries can be readily traced. But it is not for the court to say what is a sufficient marking of the boundaries. It is your duty to determine from all the evidence in the case and from the topography of the ground in question whether or not a sufficient marking of the boundaries of the claim by the plaintiffs was made so that the same could be readily traced by a person making a reasonable effort to do so. If you find from the evidence in this case that this location was so definitely marked on the ground by the plaintiffs or their agents that its boundaries could be readily traced, then I instruct you that the plaintiffs have complied

decided weight of authority that appropriate discovery is as necessary to the location of a placer claim as to the location of a lode claim. Steele v. Tanana Mines R. Co., 148 Fed. 678, 78 C. C. A. 412 (1906).

A placer mining claim is not perfected until mineral is discovered. Barnette v. Freeman, 2 Aaska, 286 (1904).

As to placer claims, there is no provision in the acts of congress requiring an actual discovery of valuable mineral before a valid location can be made. Gregory v. Pershbaker, 73 Cal. 109, 14 Pac. 401 (1887), (overruled; see next paragraph).

The holding that so discovery was necessary in order to make a valid location of a placer claim contained in Gregory v. Pershbaker, 73 Cal. 111, 14 Pac. 401, was not necessary to the decision, and the rule is the other way. New England & Coalinga Oil Co. v. Congdon, 152 Cal. 211, 92 Pac. 180 (1907).

A discovery of mineral within the limits of the claim is as essential to the validity of the location in the case of placer claims as it is in lode locations. New England & Coalinga Oil Co. v. Congdon, 152 Cal. 211, 92 Pac. 180 (1907).

As to discovery being essential to lode mining location see paragraph II of this note.

B. Oil Lands.

A prior discovery is necessary to a location of petroleum lands, they being located under the mineral laws applicable to placer locations. Nevada Sierra Oil Co. v. Miller, 97 Fed. 681 (1899).

Location of an oil placer mining claim upon which no discovery of oil has been made, vests the locators with no rights in the land as against one subsequently acquiring title thereto from the government prior to any such discovery. Olive Land & Development Co. v. Olmstead, 103 Fed. 568, 20 Mor. Min. R. 700 (1900).

The location of oil land is governed by the mineral laws applicable to placer locations, and therefore, there can be no valid location of oil land until a discovery is made. Miller v. Chrisman, 140 Cal. 440, 73 Pac. 1083, 74 Pac. 440, 98 Am. St. Rep. 63 (1903), affirmed Chrisman v. Miller, 197 U. S. 373, 25 Sup. Ct. 468, 49 L. Ed. 770 (1905).

Before the location of a claim containing petroleum or other mineral oils can be made, there must be a discovery of a deposit from which the oil is drawn.

with the requirements of the law; if not, then I instruct you that they have failed in one of the essentials of a valid placer mining location, and that your verdict must be for the defendants.

2. The law requires, in addition to marking the boundaries, that the locator shall file a notice of the location of his mining claim for record within ninety days from the date of the discovery of the claim described in the notice with the commissioner and ex-officio recorder in and for the recording district in which the claim is located. And where a notice of location is required to be recorded, as it is here, it shall contain the name or names of the locators, the date of the location, and such a description of the claim, by reference to some natural objects or permanent monument as will identify the claim. You are instructed that stakes set at each corner of the claim with a center end stake, together with some reference to other natural objects or permanent monuments in that locality, such as another well-known claim or group of claims, is a sufficient compliance with this requirement of the statute.

Bay v. Oklahoma Southern Gas, Oil & Min. Co., 13 Okla. 425, 73 Pac. 936 (1903).

As to the petroleum and natural gas being minerals and subject to location as placer mining claims, see note to Whiting v. Straup, p. ——, vol. 2, this series.

C. Association Claims.

A placer location, if made by an association of persons, may include as much as 160 acres. It is, nevertheless, a single location and as such only a single discovery is by the statute required to support it. Miller v. Chrisman, 140 Cal. 440, 73 Pac. 1083, 74 Pac. 440, 98 Am. St. Rep. 63 (1903), affirmed 197 U. S. 373, 25 Sup. Ct. 468, 49 L. Ed. 770. (1905).

The rule is now that a placer location made by an association of persons may include 160 acres; that it is but a single location, and that one discovery of minerals is required preceding its location. In re Union Oil Co., 25 Land Dec. 351 (1897), 29 Land Dec. 12 (1899); Reims v. Raumheim, 28 Land Dec. 526 (1899); McDonald v. Montana Wood Co., 14 Mont. 88, 35 Pac. 668, 43 Am. St. Rep. 616 (1894).

But one discovery is required upon which to base a placer location, whether it be one of twenty acres by an individual, or of 160 acres or less by an association. Farrell v. Hoge, 27 Land Dec. 129, 29 Land Dec. 12 (1899).

Where an association claim of 160 acres is made by eight persons it is not necessary that a discovery be made upon each twenty-acre tract thereof. McDonald v. Montana Wood Co., 14 Mont. 88, 35 Pac. 668, 43 Am. St. Rep. 616 (1894).

Where discovery is made upon a location of 80 acres of oil land and thereafter 80 acres are added thereto and a location of 160 acres made, the discovery upon the 80 acres first located is not sufficient basis for a location of the claim of 160 acres. Weed v. Snook, 144 Cal. 439, 77 Pac. 1023 (1904).

IV. Object and Construction of the Law.

The object of the law is to prevent fraud upon the government by persons attempting to acquire patent to lands not mineral in character. Shoshone Min. Co. v. Rutter, 87 Fed. 801, 31 C. C. A. 223, 59 U. S. App. 538 (1898); Lange v. Robinson, 148 Fed. 799 (1906); San-

The law does not require absolute technical strictness in the preparation of a notice of location. The pioneer prospector, as a rule, is neither a lawyer nor a surveyor. Neither mathematical precision as to measurements nor technical accuracy of expression in the preparation of the notice is either contemplated or required. The object of the notice of location is to prevent the swinging of the claim or the changing of the boundaries, and to guide the subsequent locator, and to afford him information as to the extent of the claim of the prior locator. Whatever does this thoroughly and reasonably should be held to be a good notice. And in this case, if you shall find from the evidence that the plaintiffs did, within ninety days from the date of the discovery of their claim, file for record in the office of the recorder in the precinct where the claim was situated a notice of location which did contain the name or names of the locators, the date of the location, and such a description of the claim located, by reference to some natural object or permanent

ders v. Noble, 22 Mont. 110, 55 Pac. 1037 (1899).

The object of the law in requiring the discovery to precede location is to insure good faith upon the part of the mineral locator, and to prevent frauds upon the government by persons attempting to acquire land not mineral in its character. Lange v. Robinson, 148 Fed. 799, C. C. A. 1 (1906).

When the controversy is between two mineral claimants the rule respecting the sufficiency of a discovery of mineral is more liberal than when it is between a mineral claimant and one seeking to make an agricultural or other entry under the land laws. The reason for this distinction is said to be that when land is sought to be taken out of the category of agricultural lands, the evidence of its mineral character should be reasonably clear, while in respect to a controversy between rival claimants to mineral land, the question is simply which is entitled to priority. Steele v. Tanana Mines R. Co., 148 Fed. 678, 78 C. C. A. 412 (1906).

It is the object and policy of the law to encourage the prospector and miner in their efforts to discover the hidden treasures of the mountains, and therefore as between conflicting lode claimants the law is liberally construed in favor of the senior location. Grand Central Min. Co. v. Mammoth Min. Co., 29 Utah 490, 83 Pac. 648 (1895).

The object of requiring a discovery as the basis of mining title, is to prevent the blanketing of property for speculative purposes, which is against the policy of the law, it intending to reserve the land as a reward to the man who actually makes a discovery of minerals the development of which may be beneficial to the mining extents of the country. In re Lamothe, Ont. Min. Com. Cas. 167 (1908).

V. Order of Time of Performance of Acts of Location.

A. Order Immaterial.

Where the discovery is made subsequent to the marking of boundaries and recording of notices, the location is valid from the date of the discovery, provided no rights of third parties have intervened.

United States.—Zollars Consol. Min. Co. v. Evans, 2 McC. 39, 5 Fed. 172 (1880); Crossman v. Pendery, 2 McC. 139, 8 Fed. 693 (1881); Perigo v. Erwin, 85 Fed. 904 (1898); Erwin v. Perigo, 93 Fed. 608, 35 C. C. A. 482 (1899),

monument, as would and did identify the claim, then you shall find that question in favor of the plaintiffs, otherwise against them.

3. A third requirement is that the plaintiffs shall make a discovery of mineral in or upon the claim. If you shall find from the evidence that plaintiffs marked the boundaries of their claim so that the same could be readily traced, and filed a notice of location thereof within ninety days from the date of the discovery of their claim, which notice contained the name or names of the locators, the date of the location, and such a description of the claim, located by reference to some natural object or permanent monument, as would identify the claim, then you should consider the question of discovery. You are instructed that a mere marking of the boundaries of the claim and the posting and recording of a notice of location, alone and of themselves, give no title to the locator, nor do they constitute possession. One may mark the

affirming 85 Fed. 904 (1898); Nevada Sierra Oil Co. v. Home Oil Co., 98 Fed. 673, 20 Mor. Min. R. 283 (1899); Walton v. Wild Goose Min. & T. Co., 123 Fed. 209, 60 C. C. A. 155 (1903); Uinta Tunnel Min. & T. Co. v. Ajax Gold Mining Co., 141 Fed. 563, 73 C. C. A. 35 (1905); Brannagan v. Dulaney, 2 Land Dec. 744 (1884); Reins v. Raunheim, 28 Land Dec. 526 (1899).

Alaska.—Heman v. Griffith, 1 Alaska 264 (1901); Barnette v. Freeman, 2 Alaska 286 (1904).

California.—Miller v. Chrisman, 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, 98 Am. St. Rep. 63 (1903); New England & C. Oil Co. v. Congdon, 152 Cal. 211, 92 Pac. 180 (1907).

Colorado.—Strepey v. Stark, 7 Colo. 614, 5 Pac. 111 (1884); McGinnis v. Egbert, 8 Colo. 41, 5 Pac. 652 (1884); Healey v. Rupp, 37 Colo. 25, 86 Pac. 1015 (1906).

Dakota.—Golden Terra Min. Co. v. Mahler, 4 Pac. Coast L. J. 405, 4 Mor. Min. R. 390 (Dist. Ct. Dakota, 1879); Golden Terra Min. Co. v. Smith, 2 Dak. 374, 11 N. W. 97 (1881).

Nevada.—Patchen v. Keeley, 19 Nev. 404, 14 Pac. 347 (1887).

Oregon.—Sharkey v. Candiani, 48 Or. 112, 85 Pac. 219, 7 L. R. A. (N. S.) 791 (1906).

South Dakota.—McPherson v. Julius, 17 S. D. 98, 95 N. W. 428 (1903).

Washington.—Protective Min. Co. v. Forest City Min. Co., 51 Wash. 643, 99 Pac. 1033 (1909).

Where no discovery has been made at the time of marking the boundaries on the ground and filing notice of location, but is subsequently made before the rights of third parties have intervened, the location is valid from the date of the discovery. Creede & Cripple Creek Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co., 196 U. S. 337, 25 Sup. Ct. 266, 49 L. Ed. 501 (1904).

The provisions of U. S. Rev. Stat., section 2320, that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located," construed to mean nothing more than that no location shall be considered complete until there has been a discovery. Creede & Cripple Creek Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co., 196 U. S. 337, 25 Sup. Ct. 266, 49 L. Ed. 501 (1904).

No rights can be acquired by location made before a discovery, but where discovery is made after location and before any rights of third parties have intervened, the defect is cured, and the location becomes valid. North Noonday

boundaries of a claim and record the notice of location thereof, but to make a complete valid placer mining location he must first make a discovery of mineral thereon. This, then, brings us to the third question in this case, to-wit, that of discovery of mineral within the exterior boundaries of the claim. What is discovery? What finding of mineral on a mining claim is sufficient to comply with the law which requires "that no location of a mining claim shall be made until discovery" of mineral within the limits of the claim located? What is necessary to constitute a discovery of mineral within the limits of the claim located? What is necessary to constitute a discovery of mineral is not prescribed by statute, but the Supreme Court of the United States in a recent case has laid down the rule which must govern this court and this jury in answering the question, what is a discovery?

"Where mineral has been found, and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of

Min. Co. v. Orient Min. Co., 6 Sawy. 299, 1 Fed. 522, 9 Mor. Min. R. 529 (1880); Jupiter Min. Co. v. Bodie Consl. Min. Co., 7 Sawy. 96, 11 Fed. 666, 4 Mor. Min. R. 411 (1881).

A discovery subsequent to the marking of boundaries, etc., validates the claim from the date of the discovery. A location is in no case complete until a discovery. Uinta Tunnel Min. & Transp. Co. v. Creede & Cripple Creek Min. & Mill. Co., 119 Fed. 164, 57 C. C. A. 200 (1902).

A discovery made after the posting of notice and marking of boundaries, does not relate back to the time of those acts, but completes and validates the location. Thus where the prospector noticed and staked his claim, but left before making discovery, he can claim no rights as against one who before his return had made a valid discovery and location upon the ground. Johnson v. White, 160 Fed. 901 (1908).

Although prior to location no discovery of mineral was made within the ground claimed, upon a subsequent discovery prior to application for patent the location became good and sufficient in the absence of any adverse rights. In re Mitchell, 2 Land Dec. 752 (1884).

It is a general rule in mining locations that while discovery, marking the boundaries, and recording are prerequisite to a valid mining location, it is immaterial in what order they are performed so that each is performed before other rights intervene. Thompson v. Burk, 2 Alaska 249 (1904).

Discovery of mineral, marking the boundaries on the surface, and recording of notice are essential to the validity of a mining location. It is immaterial in what order these acts are done, provided they are all performed before other rights intervene. Redden v. Harlan, 2 Alaska 402 (1905).

If discovery is made prior to the marking of boundaries and recording of notice, these acts relate back to the time of discovery, but if discovery is the last act of the location it gives life and validity of the location and it is effective only from the date of the discovery. Redden v. Harlan, 2 Alaska 402 (1905).

The three essentials of a valid mining location are discovery of mineral, marking the boundaries on the surface of the ground, and a notice of location describing the claim with reasonable certainty, posted and recorded, as required by the statute and local regulations, and until

success, in developing a valuable mine, the requirements of the statute have been met. To hold otherwise would tend to make of little avail, if not entirely nugatory, that provision of the law whereby all valuable mineral deposits in land belonging to the United States are declared to be free and open to exploration and purchase."

Some courts have held that a mere willingness on the part of the locator to further expend his labor and means was a fair criterion, but it would seem that the question should not be left to the arbitrary will of the locator.

"Willingness, unless evidenced by actual exploitation, would be a mere mental state, which could not be satisfactorily proved. The facts which are within the observation of the discoverer, and which induce him to locate, should be such as would justify a man of ordinary prudence, not necessarily a skilled miner, in the expenditure of his time and money in the development of the property."

And in the case from which I am now quoting (Chrisman v. Miller, 197 U. S. 313, 25 Sup. Ct. 468, 49 L. Ed. 770), the court further said:

all of these three acts are performed there is no valid location. The mere marking of boundaries and recording without a discovery of mineral is a mere speculative proceeding, and confers no right or title. The order of the performance of the acts is immaterial, provided that no rights of third parties intervene in the interim between the performance of the first and last of the acts. Bulette v. Dodge, 2 Alaska 427 (1905); Charlton v. Kelly, principal case.

Conceding that where discovery is made after notice of location is filed it relates back to the filing of the notice, still there is no valid location until the discovery is made, and up to that time the land remains government land; thus where a ditch is located between the time of filing of the notice and the discovery, it remains a valid easement, and is not destroyed by the discovery. Tuolumne Consol. Min. Co. v. Maier, 134 Cal. 583, 66 Pac. 863, 21 Mor. Min. R. 678 (1901).

A location is valid only from the time of discovery. Prior to that time it is government land. Tuolumne Consol. Min. Co. v. Maier, 134 Cal. 583, 66 Pac. 863 (1901).

In the absence of any intervening rights of third parties, the discovery of oil in public land located after the filing of notice, etc., will validate location. Weed v. Snook, 144 Cal. 439, 77 Pac. 1023 (1904).

Where discovery is not made until after the other acts of location, it will not relate back to such acts so as to affect any rights of third parties which have intervened between the acts of location and the discovery. Beals v. Cone, 27 Colo. 473, 62 Pac. 948, 83 Am. St. Rep. 92, 20 Mor. Min. R. 591 (1900).

The validity of the location of a mining claim is made to depend primarily upon the discovery of a vein or lode within its limits. Until such discovery, no rights are acquired by location. The other requisites which must be observed in order to perfect and keep alive a valid location are not imperative except as against the rights of third persons. If the necessary steps outside of discovery are not taken within the time required by law, but are complied with before the rights of third parties intervene, they relate back to the date of discovery; but not so with discovery, for it is upon that act that the very life of a mineral location depends, and from the time of such discovery only would the location be valid, provided, of course, that others had not previously acquired

"It is true that when the controversy is between two mineral claimants, the rule respecting the sufficiency of a discovery of mineral is more liberal than when it is between a mineral claimant and one seeking to make an agricultural entry, for the reason that where land is sought to be taken out of the category of agricultural lands the evidence of its mineral character should be reasonably clear, while in respect to mineral lands in a controversy between mineral claimants, the question is simply which is entitled to priority. That, it is true, is the case before us. But even in such a case, as shown by the authorities we have cited, there must be such a discovery of mineral as gives reasonable evidence of the fact either that there is a vein or lode carrying the precious mineral, or, if it is claimed as placer ground, that it is valuable for such mining."

The facts upon which discovery in Chrisman v. Miller were based are stated in the opinion of the Supreme Court of the United States as follows:

"Upon the question of discovery, the sole evidence is that of Barieau himself. Giving the fullest weight to that testimony, it amounts to no more than this: that Barieau had walked over the land at the time he

rights adverse thereto. Beals v. Cone, 27 Colo. 473, 62 Pac. 948, 83 Am. St. Rep. 92, 20 Mor. Min. R. 591 (1900).

The order of time in which the several acts of location are performed is not of the essence of the requirements of the law, and it is immaterial that the discovery was made subsequent to the completion of the other acts of location, provided only that all the necessary acts are done before intervening rights of third persons accrue. If all the other steps had been taken before a valid discovery and a valid discovery then follows, it would be a useless and idle ceremony, which the law does not require, for the locators again to locate their claims and refile their location certificate or file a new one. The discovery relates back to the time of the other acts of location so far as to validate the location from the time of discovery. Brewster v. Shoemaker, 28 Colo. 126, 63 Pac. 309, 89 Am. St. Rep. 188, 21 Mor. Min. R. 155 (1900).

One who files an adverse claim in the land office must base the same upon rights which he had at that time, and cannot, in a proceeding to test the same, set up an after-acquired title, and thus could not set up a location incomplete for want of discovery at the time of making the adverse claim. Healey v. Rupp, 37 Colo. 25, 86 Pac. 1015 (1906).

The general rule is that the order in which the various steps requisite to make a valid location of a mining claim are taken is immaterial, provided they are completed before the rights of third parties intervene. Therefore a discovery, though made after staking and recording, inures to the benefit of the locator, but only as of the date of such discovery, provided of course that others have not previously acquired rights to the premises upon which such discovery is made. Healey v. Rupp, 37 Colo. 25, 86 Pac. 1015 (1906).

Where a discovery is made by a prospector of such a character as to entitle him to make a valid location on the 16th day of September, and he sets his discovery stake on that day, partially stakes and marks his claim on the 17th, and completes his staking and marking of boundaries according to law on the 18th, his discovery and location will date from the 16th day of September. Burke v. McDonald, 2 Idaho, 1023, 3 Idaho (Hasb.) 296, 29 Pac. 98 (1892).

Although a location must rest upon and remain incomplete until discovery is made, it is not required, in the ab-

posted his notice, and had discovered 'indications' of petroleum. Specifically, he says that he saw a spring, and the oil comes out and floats over the water in the summer time, when it is hot. In June, 1895, there was a little water with oil and a little oil with water coming out. It was dripping over a rock about two feet high. There was no pool; it was just dripping a little water and oil; not much water. This is all the discovery which it is even pretended was made under the Barieau location."

Petroleum oil is a mineral, and is located as a placer claim, and the same rules control in defining what is a discovery thereof as control in defining what is a discovery of gold, and in the case of the Barieau location, and upon the facts of surface discovery quoted, the Supreme Court of California held that there was no discovery, and the Supreme Court of the United States affirmed that rule and said:

"Giving full weight to the testimony of Barieau, we should not be justified, even in a case coming from a federal court, in overthrowing the finding that he made no discovery. There was not enough in what he

sence of intervening rights, that discovery shall precede the other acts of location. If made prior to any intervening rights, though subsequent to marking the boundaries and recording the claim, the location, if otherwise good, will be validated at least from the date of discovery. Whiting v. Straup, p. ——, vol. 2, this series.

A discovery has relation to the boundaries of the claim within which it is made, fixes the right of possession to the claim within such boundaries, and has no relation to the claim, with extended boundaries, where the boundaries were extended six or seven months later, and so as to include or overlap a portion of the location or claim of a third party. The discovery could not affect the rights of a third party in the overlapping ground. Bigelow v. Conradt, 159 Fed. 868, 87 C. C. A. 48 (1908).

A mining claim located prior to discovery of mineral thereon is validated by a subsequent discovery, and where the location is first made by cotenants the location, when subsequently validated by the discovery, is the property of the cotenants and one cotenant cannot acquire adverse interests in such case any more than in any other case. Cedar Canyon Consol. Min. Co. v. Yarwood, 27 Wash. 271, 67 Pac. 749, 91 Am. St. Rep. 841, 22 Mor. Min. R. 11 (1902).

As to questions of priority of discovery, completing location, discovery and location, and marking of boundaries, see XIII, note to Dwinnell v. Dyer, vol. 3, this series.

B. Rule Applies to Placer Locations.

The rule that a discovery made after the performance of the other acts of location validates the location applies to placer as well as lode locations. Miller v. Chrisman, 140 Cal. 440, 73 Pac. 1083, 74 Pac. 440, 98 Am. St. Rep. 63 (1903); affirmed Chrisman v. Miller, 197 U. S. 373, 25 Sup. Ct. 468, 49 L. Ed. 770 (1905).

C. Montana Rule.

A location to be effectual must be good at the time it is made, and it follows that a location void at the time it is made, because of no discovery or because the discovery was made on a claim already located and patented, continues and remains void, and is not cured or made effectual by subsequent discovery on the claim located. The statute does not permit a location and then a discovery, but in all cases the discovery must precede the location. We

claims to have seen to have justified a prudent person in the expenditure of money and labor in exploitation for petroleum. It merely suggested a possibility that the ground contained oil sufficient to make it chiefly valuable therefor."

And the Supreme Court of the United States affirmed the holding of the Supreme Court of California that such slight surface indications of oil did not constitute a discovery under the placer mining laws of the United States. You are now instructed that the rule so announced by the Supreme Court of the United States in Chrisman v. Miller, upon the facts so read to you, is applicable to this case, and so far as the evidence in this case is similar to that, is binding upon the question of discovery.

Upon the facts so quoted by the Supreme Court of the United States from the opinion of the Supreme Court of California in the case of Chrisman v. Miller, the latter court (140 Cal. 440, 73 Pac. 1083, 98 Am. St. Rep. 63) said on the question of discovery:

cannot do away with the express language of the statute and hold that there may be a valid location of a mining claim before there has been a discovery on the claim located. Upton v. Larkin, 5 Mont. 600, 6 Pac. 66 (1885); Upton v. Larkin, 7 Mont. 447, 17 Pac. 728 (1888).

If it be the law that one may enter upon a claim and subsequently make a discovery of mineral thereon and thus validate the claim, such would be applicable to an occasion where a person enters upon the public mineral lands and discovers what he supposes to be a vein or lode and makes a location by virtue of such discovery before he has discovered the true vein or lode, and subsequently, and before any other person has acquired any rights, makes such discovery. Upton v. Larkin, 5 Mont. 600, 6 Pac. 66 (1885).

A notice of location posted upon mineral land before discovery is made, is an absolute nullity. Gemmell v. Swain, 28 Mont. 331, 72 Pac. 662, 98 Am. St. Rep. 570, 22 Mor. Min. R. 716 (1903).

D. Ontario Rule.

Discovery must first be made upon the property before there is any right to plant a single post or run a single line for the staking out of a mining claim. In re Haight et al. Ont. Min. Com. Cas. 32 (1906).

Discovery must be made before staking the claim, and a subsequent discovery will not cure the invalidity. In re McCrimmon et al. Ont. Min. Com. Cas. 79 (1907); In re Lamothe, Ont. Min. Com. Cas. 167 (1908).

Actual discovery must be made before a mining claim can be staked out, and a discovery made after the staking will not validate the claim. In re Smith et al. Ont. Min. Com. Cas. 314 (1908).

Discovery must be made before staking or the claim is invalid. In re Bilsky et al. Ont. Min. Com. Cas. 349 (1909).

VI. Same Discovery for Two Locations.

The same discovery cannot be used as a basis of two separate locations. Reiner v. Schroeder, 146 Cal. 411, 80 Pac. 517 (1905); McKinstry v. Clark, 4 Mont. 370, 1 Pac. 759 (1882); Reynolds v. Pascoe, 24 Utah 219, 66 Pac. 1064 (1901); In re Poplar Creek Consol. Quartz Mine, 16 Land Dec. 1 (1893).

As to one discovery being sufficient for association placer claim, see paragraph III, C, of this note..

"To constitute a discovery, the law requires something more than conjectures, hope, or even indications. The geological formation of the country may be such as scientific research and practical experience have shown to be likely to yield oil in paying quantities. Taken with this, there may be other surface indications, such as seepage of oil. All these things may be sufficient to justify the expectation and hope that, upon driving a well to sufficient depth, oil may be discovered, but one and all they do do not in and of themselves amount to a discovery."

This case, including this definition of discovery, was affirmed upon appeal to the Supreme Court of the United States, and you are now instructed that the rule and definition so announced, in so far as it is applicable to the facts in the case before you, is binding upon you in determining the question of discovery in this case.

There is evidence offered by the plaintiffs to show that prior to June 26, 1905, when the defendant claims to have entered upon this ground

VII. Place of Discovery.

A. Must Be on Land Claimed.

The discovery must be made within the limits of the land located. Larkin v. Upton, 144 U. S. 19, 12 Sup. Ct. 614, 36 L. Ed. 330 (1891); Jupiter Min. Co. v. Bodie Consol. Min. Co., 7 Sawy. 96, 11 Fed. 666 (1881); Little Pittsburgh Consol. Min. Co. v. Amie Min. Co., 17 Fed. 57 (1883); Book v. Justice Min. Co., 58 Fed. 106, 17 Mor. Min. R. 617 (1893); In re Laney, 9 Land Dec. 83 (1889); Waterloo Min. Co. v. Doe, 17 Land Dec. 111 (1893); Bunker Hill & S. M. & C. Co. v. Shoshone Min. Co., 33 Land Dec. 142 (1904); Wolfley v. Lebanon Min. Co., 4 Colo. 112, (1878); Girard v. Carson, 22 Colo. 345, 45 Pac. 508 (1896); Golden Terra Min. Co. v. Smith, 2 Dak. 377, 11 N. W. 98 (1881); Upton v. Larkin, 5 Mont. 600, 6 Pac. 66 (1885); O'Donnell v. Glenn, 8 Mont. 248, 19 Pac. 302 (1888); Watson v. Mayberry, 15 Utah 265, 49 Pac. 479 (1897).

Where a shaft is sunk outside of the ground located, and drifts run from it into the ground, it cannot avail unless a discovery of a lode within the ground is shown. Zalars v. Evans, 2 McC. 39, 5 Fed. 172 (1880).

Discovery of mineral within the limits of the claim is essential to a valid location. Score v. Griffin, 9 Ariz. 347, 83 Pac. 350 (1905).

In order to constitute a valid location, there must be a discovery of a vein or lode of mineral bearing rock in place, within the limits of the claim attempted to be located, and the discovery of a vein made upon an adjoining location owned by the locator and others, which vein, if maintaining the same strike as at the point of discovery, would pass into the claim attempted to be located, but which had not been, as a matter of fact, traced or shown to have passed into the ground attempted to be located, is not a sufficient discovery to satisfy the requirements of the statute. Michael v. Mills, 22 Colo. 439, 46 Pac. 429 (1896).

To make a valid location of a lode mining claim there must be a discovery within the limits of the claim located of a vein or crevice of quartz of ore, with trace of well-defined wall on a lead, lode or ledge of rock in place, containing gold, silver or other valuable mineral deposits. Upton v. Larkin, 7 Mont. 449, 17 Pac. 728 (1888).

It is by means of the discovery shaft or the cross cut the locator manifests his intention. If he chooses to make such manifestation by means of a discovery shaft, he must do the work on

and initiated his location, the plaintiffs, by A. J. Kelsey and John Klonos and Louis Schmidt, discovered gold by panning in a little draw on the claim in controversy. There is evidence offered to show that at that place these witnesses discovered colors of gold and even a few cents' worth in what is commonly called "muck" by the miners, being, however, in the bed of a little stream in the draw, and in rather heavier material than the ordinary muck. It is for you to determine from all the evidence in the case whether or not the witnesses actually so found gold at that time and place as testified to by them, and if you believe from the evidence that they did so find such gold, you should then determine whether or not it was of sufficient quantity and character and found under such conditions as to constitute a discovery, and whether such finding would justify a man of ordinary prudence, not necessarily a skilled miner, in the expenditure of his time and money in the development of the property. If you shall find and believe from the evidence in this case that Klonos, Kelsey and Schmidt found the colors and particles of gold so

the claim. The shaft must be sunk on the claim, for so the statute declares, and this is done in order that any one interested may see the evidence of his good faith; and for like reason if he makes manifest his intention by means of a cross cut there must be an opening upon the claim, otherwise the owner of the claim upon which such opening is situated may rightfully refuse admission to such cross cut to any and every one except only the locator, and if the locator has only a license to use such opening, he may at any time deny admission to the locator himself. It cannot be that the requirements of the law are met by doing work over which the locator himself has no control as a matter of right and from which he may be excluded at any time by an entire stranger. Butte Consol. Min. Co. v. Barker, 35 Mont. 327, 89 Pac. 302 (1907).

The discovery must be made within the limits of the location as it is ultimately marked upon the ground. McPherson v. Julius, 17 So. Dak. 98, 95 N. W. 428 (1903).

It is well settled that whether it be a lode or placer claim, a discovery of mineral within the limits of the claim is essential to a valid location of a mining claim on the public ground. Whiting v. Straup, p. ——, vol. 2, this series.

Where discovery was described in application for mining claim as being near the north boundary, where it appeared no sufficient discovery had been made, and that a sufficient discovery had been made by other parties near the southwest corner, the applicant at the hearing claiming his discovery to have been at the southwest corner, the other evidence being conflicting, it was held no sufficient discovery was shown. In re Legris, Ont. Min. Com. Cas. 285 (1908).

The discovery must be within the limits of the claim as applied for, and where it was outside such limits, although within the boundaries as actually staked on the ground, the claim was held invalid. In re Burd & Paquetee, Ont. Min. Com. Cas. 419 (1909).

B. Anywhere on Land Claimed.

Where the statute does not provide for a discovery shaft or notice at the point of discovery any valid discovery prior to location is sufficient as the basis thereof. Little Pittsburgh Consol. Min. Co. v. Amie Min. Co., 17 Fed. 57 (1883); Perigo v. Erwin, 85 Fed. 904 (1898), affirmed 93 Fed. 608, 35 C. C. A. 482

testified to by them in the draw or small water course on the surface of the ground in dispute, then you should determine whether or not such finding was of sufficient character, and found in such places, and under such conditions, as to constitute such a discovery of mineral as will satisfy the law.

You are instructed that mere indications, however strong, are not sufficient to answer the requirements of the statute, which requires, as one of the essential conditions of the making of a valid location of unappropriated public land of the United States under the mining laws, a discovery of mineral within the limits of the claim. Indication of the existence of a thing is not the thing itself.

An "indication" in the sense used in these instructions means that which merely points to or tends to prove. If you shall find and believe from the evidence in this case that Kelsey, Klonos and Schmidt actually found colors of gold, or even small particles of gold, in the draw or water course

(1899); In re Cayuga Lode, 5 Land Dec. 703 (1887); O'Donnell v. Glenn, 8 Mont. 248, 19 Pac. 302 (1888); Silver City Gold Min. Co. v. Lowry, 19 Utah 334, 57 Pac. 11 (1899).

Where valuable ore was not discovered in the discovery shaft, but was discovered elsewhere on the claim, and more work was done than would be equivalent to a discovery shaft, it was held sufficient to meet the requirements of the statute. Gibson v. Hjul (Nev.), 108 Pac. 759 (1910).

C. In Discovery Shaft.

1. In General.

Where the statute requires a discovery shaft, the discovery must be made in that shaft.

United States.—Little Gunnell Gold Min. Co. v. Kimber, Fed. Cas. No. 8402, 1 Mor. Min. R. 536 (1878); Faxon v. Barnard, 2 McC. 44, 4 Fed. 702 (1880); Erhardt v. Boaro, 3 McC. 19, 8 Fed. 692 (1881); Van Zandt v. Argentine Min. Co., 2 McC. 159, 8 Fed. 725, 4 Mor. Min. R. 441 (1881); Terrible Min. Co. v. Argentine Min. Co., 5 McC. 639, 89 Fed. 583 (1883); Wight v. Tabor, 2 Land Dec. 738 (1884); Conlin v. Kelly, 12 Land Dec. 1 (1891).

Colorado.—Gray v. Truby, 6 Colo. 278 (1882); Armstrong v. Lower, 6 Colo. 393 (1882); Strepey v. Stark, 7 Colo. 614, 5 Pac. 111 (1884); Quimby v. Boyd, 8 Colo. 194, 6 Pac. 462 (1884); McGinnis v. Egbert, 8 Colo. 41, 5 Pac. 652 (1884); Electro-Magnetic Min. Co. v. Van Auken, 9 Colo, 204, 11 Pac. 80 (1886); Bryan v. McCaig, 10 Colo. 309, 15 Pac. 413 (1887); Beals v. Cone, 27 Colo. 473, 62 Pac. 948, 83 Am. St. Rep. 92, 20 Mor. Min. R. 591 (1900); Brewster v. Shoemaker, 28 Colo. 176, 63 Pac. 309, 89 Am. St. Rep. 188, 53 L. R. A. 793 (1900); McMillen v. Ferrum Min. Co., 32 Colo. 38, 74 Pac. 461, 105 Am. St. Rep. 64 (1903); Miller v. Girard, 3 Colo. App. 278, 33 Pac. 69 (1893); Moyle v. Bullene, 7 Colo. App. 308, 44 Pac. 69 (1896); Fleming v. Daly, 12 Colo. App. 439, 54 Pac. 946 (1889).

Montana.—O'Donnell v. Glenn, 8 Mont. 248, 19 Pac. 302 (1888); Flick v. Gold Hill & L. M. Min. Co., 8 Mont. 298, 20 Pac. 807 (1889); Ormund v. Granite Mountain Min. Co., 11 Mont. 303, 28 Pac. 289 (1891); Walsh v. Mueller, 16 Mont. 180, 40 Pac. 292 (1895); Sanders v. Noble, 22 Mont. 110, 55 Pac. 1037 (1899).

Nevada.—Sisson v. Sommers, 24 Nev. 379, 55 Pac. 829 (1899).

on the surface of this claim, nearly two hundred feet above the bed rock, and on the surface of a deep layer of nonmineral bearing muck, then you are to consider whether it was found in such quantity and under such circumstances and conditions as to justify a man of ordinary prudence, not necessarily a skilled miner, in the expenditure of his time and money in the development of the property, or whether it was so limited and of so little value, and found under such circumstances and conditions, as merely to indicate—to point out and tend to prove, only—that it came from higher and adjoining lands, and had no weight, value, or connection with any such gold on that ground as would justify development. Was it sufficient in quantity, and found in such a place, and under such circumstances, as to justify a man of ordinary prudence, not necessarily a skilled miner, in the expenditure of his time and money in the development of the property? If it was only a mere indication of gold on adjoining and higher lands, or in the neighborhood, but not on the land in

New Mexico.—Zeckendorf v. Hutchison, 1 N. M. 476, 9 Mor. Min. R. 483 (1871).

Where the statute requires a discovery shaft, the location rests on what may be found in that shaft, and if nothing is found there, or if what is found there does not extend beyond the limits of the shaft, the discovery of a body of ore elsewhere in the claim will not avail. Van Zandt v. Argentine Min. Co., 2 McC. 159, 8 Fed. 725, 4 Mor. Min. R. 441 (1881).

Under the Colorado Statute, where a lode is cut at a depth of ten feet below the surface by means of an open cut, cross cut or tunnel, it is the same as if a discovery shaft were sunk on the vein to that depth. Gray v. Truby, 6 Colo. 278 (1882); Electro-Magneto Co. v. Van Auken, 9 Colo. 204, 11 Pac. 80 (1886); Brewster v. Shoemaker, 28 Colo. 176, 63 Pac. 309, 89 Am. St. Rep. 188, 53 L. R. A. 793 (1900).

In states having provision for discovery shaft such as Colorado, where the locator himself selects the discovery shaft, the one in which discovery of mineral has been made, and there posts his location stake and bases his location upon such discovery, he may not after intervening rights have attached, abandon and disregard the same, or neglect to comply with the provisions of the law and select another discovery upon which his location is not predicated. McMillen v. Ferrum Min. Co., 32 Colo. 38, 74 Pac. 461, 105 Am. St. Rep. 64 (1903).

Knowedge of the existence of a vein in an old abandoned shaft situated upon the ground attempted to be located, will not avail the locator where he sinks his discovery shaft, designating it as such, upon another portion of the ground, and fails to discover any mineral therein. McMillen v. Ferrum Min. Co., 32 Colo. 38, 74 Pac. 461, 105 Am. St. Rep. 64 (1903).

The purpose of the discovery shaft is to expose the vein upon which the location is based, or at least one vein, and a discovery elsewhere within the limits of the claim will not supply its place. McMillen v. Ferrum Min. Co., 32 Colo. 38, 74 Pac. 461, 105 Am. St. Rep. 64 (1903).

The discovery shaft is an essential evidence of title, and without it the claim cannot be valid. Miller v. Girard, 3 Colo. App. 278, 33 Pac. 69 (1893).

Under the Colorado Statute, discovery must be made in the discovery shaft, and for the purposes of location, a discovery

controversy, if it was not found in such quantity, character, or value, nor under such circumstances or conditions, as to justify a man of ordinary prudence, not necessarily a skilled miner, in the expenditure of his time and money in the development of the property, then it would not constitute a discovery such as would satisfy the law, and would only be an indication; and if you should so find from the evidence in this case your decision on that point should be against the plaintiffs.

It is entirely true that the statute, requiring as a condition to a valid location the discovery of mineral within the limits of the claim, should, as between conflicting claimants to mineral lands, receive a broad and liberal construction, and so as to protect bona fide locators who have really made a discovery of mineral, whether it be under the statute providing for the location of vein or lode claims or placer claims. While the statute requiring the discovery of mineral as one of the essential conditions of a valid location of land under the mining laws should be liberally

outside the discovery shaft is not sufficient. Fleming v. Daly, 12 Colo. App. 439, 54 Pac. 946 (1899).

Where the statute requires the sinking of a discovery shaft, such shaft must be sunk upon each claim where a number of claims are located by different parties along the same lode, but held in severalty. Zeckendorf v. Hutchison, 1 N. M. 476, 9 Mor. Min. R. 483 (1871).

2. Open Cut or Adit.

By the Colorado Statute, an open cut and cross cut or a tunnel or adit are made the equivalent of a discovery shaft, and while it is expressly provided that the first three shall cut the lode at a depth of ten feet below the surface, there is no such requirement in the case of an adit. It is only required to be at least ten feet in along the lode from the point where the lode may be in any manner discovered, but the context and language quite clearly indicate an intention upon the part of the legislature in such a case to substitute horizontal development in and along the lode for a distance of ten feet for the ten feet in depth required in other cases; and while there is no express requirement of depth or development, it must always be such that its dimensions and character make it fairly the equivalent of a discovery shaft, and bring it substantially within the meaning of the term adit, to-wit, an entrance or passage, a term in mining used to denote the opening by which a mine is entered, or by which water and ores are carried away, called also a drift. Gray v. Truby, 6 Colo. 278 (1882).

Under the Colorado Statute providing that a ten-foot adit be considered equivalent to a discovery shaft, the adit may be open, or under cover, or part open and part under cover, dependent upon the nature of the ground, etc. Electro-Magnetic Min. & Dev. Co. v. Van Auken, 9 Colo. 204, 11 Pac. 80 (1886).

3. Sinking Second Shaft.

The absence of a discovery in the discovery shaft cannot be supplied by discovery of a vein in another shaft. Beals v. Cone, 27 Colo. 473, 62 Pac. 948, 83 Am. St. Rep. 92, 20 Mor. Min. R. 591 (1900).

The miner is not bound to make the first shaft or opening which he may sink his discovery shaft. If, after sinking in one place and failing to find a lode, he sinks in another and finds one, he may make the second his discovery shaft, on which location may be based. It is competent for him to make any shaft he may

construed in behalf of bona fide locators, the statutory requirement that discovery shall be made should not be ignored, and the discovery must be of such a substantial kind and character as to convince the jury, by a fair preponderance of the evidence, that it would justify a man of ordinary prudence, not necessarily a skilled miner, in the expenditure of his time and money in the development of the property.

Did the plaintiffs make such a discovery prior to the entry of the defendant Kelly on the ground in dispute on July 1, 1905? In answering that inquiry you may and should consider all the evidence on both sides in relation to the place where Klonos, Kelsey, and Schmidt say they found mineral on the surface; the depth to bed rock; the character of the overlying muck; its depth; and the location of the pay gravels, and their depth from the surface. You should consider all the evidence offered by miners and others in relation to the character of the so-called "muck," its mineral or nonmineral bearing quality, and whether colors or small

sink a discovery shaft, but it must disclose a lode or vein of rock in place, not simply mineral in a fragmentary condition. Terrible Min. Co. v. Argentine Min. Co., 5 McC. 639, 89 Fed. 583 (1883).

D. In Tunnel.

Discovery of a vein in a tunnel in accordance with U. S. Rev. St., sec. 2323 gives the right of location, and this is not lost by failure to mark the boundaries of the claim upon the surface. Campbell v. Ellet, 167 U. S. 116, 17 Sup. Ct. 765, 42 L. Ed. 101 (1897).

Where discovery is made in a tunnel it has the same effect as discovery made from the surface. Risco-Aspen Consol. Min. Co. v. Enterprise Min. Co., 53 Fed. 321 (1892).

Where discovery is made in a tunnel the tunnel takes the place of and does away with the necessity for a discovery shaft. Risco-Aspen Consol. Min. Co. v. Enterprise Min. Co., 53 Fed. 321 (1892).

Where discovery is made in a tunnel, under the provision of section 2323, U. S. Rev. Stat., it is not necessary that another discovery be made from the surface, and the discovery in the tunnel will be held valid as against a subsequent discovery of the same lode from the surface. Ellet v. Campbell, 18 Colo. 510, 33 Pac. 521 (1893), affirmed 167 U. S. 116, 17 Sup. Ct. 765, 42 L. Ed. 101 (1896).

The line of the tunnel mentioned in the Acts of May 10, 1872, was intended to describe and designate a width marked between the exterior lines or the sides of the tunnel, and does not mean the entire width and length of the surveyed tunnel site. Corning Tunnel & Min. Co. v. Pell, 4 Colo. 507, 14 Mor. Min. R. 612 (1878).

A tunnel located and run for the development of veins or lode pursuant to the provisions of section 2323, Rev. St. U. S., becomes a mining claim and entitles the owner thereof to make an adverse claim against one claiming to locate upon the line of the tunnel, and while the same was being prosecuted with reasonable diligence such tunnel owner was entitled to proceed under the provisions of section 2326, Rev. St. U. S. Back v. Sierra Nevada Min. Co., 2 Idaho 386, 2 Idaho (Hasb.) 420, 17 Pac. 83 (1888).

E. On Any Part of Lode.

When the vein or lode does not crop out, but is what is called a blind vein or lode, the apex thereof would necessarily

particles of gold found there are mere indications of mineral in the neighborhood, or whether alone, and without the subsequent means of information that gold existed nearly two hundred feet below on bed rock, they would justify a man of ordinary prudence, not necessarily a skilled miner, in the expenditure of his time and money in the development of the property. You should consider the geological and natural conditions of the ground as shown by the evidence. After considering all the evidence in relation thereto, you should determine: (1) Did the plaintiffs or their agents, Klonos and Kelsey, and the witness Schmidt find any gold on the surface, as so testified to by them? And (2) if they did, was it of such quantity, character, and found under such circumstances and in such connection with natural conditions, as to justify a man of ordinary prudence, not necessarily a skilled miner, in the expenditure of his time and money in the development of the property? If you find that plaintiffs or their agents did find gold on the surface, and

be below the surface of the ground, and if the locator at the time of location found, or if from the work done by others prior thereto he could see, at any point within the limits of said location, a lode or vein, the top or apex of which was within the lines of the location, he made a discovery of a lode or vein such as the law requires to be made to entitle him to locate the ground, and it is wholly immaterial as to the amount or quantity of such vein or lode which may have been found within the limits of the location, Any amount of it would suffice, however small, either as to the amount of the vein or its apex, within the limits of the location. Larkin v. Upton, 144 U. S. 19, 12 Sup. Ct. 614, 36 L. Ed. 330 (1892).

Any portion of the apex on the course or strike of the vein found within the limits of a claim is a sufficient discovery to entitle the locator to obtain title. Larkin v. Upton, 144 U. S. 19, 12 Sup. Ct. 614, 36, L. Ed. 330 (1892).

It is unquestioned that the top or apex of a vein must be within the boundaries of a claim in order to enable a locator to perfect his location and obtain title. Larkin v. Upton, 144 U. S. 19, 12 Sup. Ct. 614, 36 L. Ed. 330 (1892).

Discovery and location of a vein on its "dip" will prevail against a junior discovery and location on the apex of the vein. Van Zandt v. Argentine Min. Co., 2 McC. 159, 8 Fed. 725, 4 Mor. Min. R. 441 (1881).

In the absence of statute requiring anything further, the existence and knowledge of gold and silver bearing rock showing upon the surface of the claim, being a part of the ledge "cropped out" is sufficient as a discovery. Score v. Griffin, 9 Ariz. 295, 80 Pac. 331 (1905), reversed upon the ground that upon rehearing it appeared that the discovery, whatever it was, was made outside of the limits of the land located. Score v. Griffin, 9 Ariz. 347, 83 Pac. 350 (1905).

Discovery of mineral on the dip of a vein below the surface by means of a tunnel and where the vein had never opened upon the surface or shown to have an apex within the limits of the claim as located, is sufficient. Brewster v. Shoemaker, 28 Colo. 176, 63 Pac. 309, 89 Am. St. Rep. 188, 53 L. R. A. 793 (1900).

F. On Patented Land.

A discovery made within the limits of a patented claim, or upon patented land,

that it was of such quantity and character, and found under such circumstances and in such connection with natural conditions as to justify a man of ordinary prudence, not necessarily a skilled miner, in the expenditure of his time and money in the development of the property, then it was sufficient to constitute a discovery in the meaning of the law, and you should find on that question for the plaintiffs, but if you shall not so find, by a preponderance of the evidence, then it was insufficient, and you should find on that question against the plaintiffs and for the defendants.

4. You are further instructed that if you shall find and believe from the evidence in this case that prior to June 26, 1905, when the defendants claim to have located the ground in dispute, and prior to July 1, 1905, when it is admitted that the defendants went into possession of the ground, and have ever since remained in possession thereof, the plaintiffs personally, or by their agent, so marked the boundaries of the claim upon the ground by stakes or other permanent monuments that the same could be readily traced, and filed their notice of location thereof

is not sufficient as the basis of a valid location. Belke v. Meagher, 104 U. S. 279, 26 L. Ed. 735 (1881); Iron Silver Min. Co. v. Mike Co., 143 U. S. 394, 12 Sup. Ct. 543, 36 L. Ed. 201 (1891); Lowry v. Silver City Gold & Silver Min. Co., 179 U. S. 196, 21 Sup. Ct. 104, 45 L. Ed. 151, 21 Mor. Min. R. 113 (1900); Little Pittsburgh Consol. Min. Co. v. Amie Min. Co., 17 Fed. 57 (1883); Crown Point Min. Co. v. Buck, 97 Fed. 462 (1899); In re Williams, 20 Land Dec. 458 (1895); Armstrong v. Lower, 6 Colo. 393 (1882); Moyle v. Bullene. 7 Colo. App. 308, 44 Pac. 69 (1896); Golden Terra Min. Co. v. Mahler, 4 Pac. C. L. J. 405, 4 Mor. Min. R. 390 (Dist. Ct. Dakota (1879); Upton v. Larkin, 5 Mont. 600, 6 Pac. 66 (1885); Ormund v. Granite Mt. Min. Co., 11 Mont., 303, 28 Pac. 289 (1891); McPherson v. Julius, 17 So. D. 98, 95 N. W. 428 (1903); Eilers v. Boatman, 3 Utah 159, 2 Pac. 66 (1881).

Where the discovery shaft is sunk upon an overlapping patented claim, but is thereafter abandoned and a new discovery shaft disclosing the vein is sunk upon the claim, the title is not invalidated by reason of the first discovery shaft being upon the patented claim. Lowry v. Silver City Gold & Silver Min. Co., 179 U. S. 196, 21 Sup. Ct. 104, 45 L. Ed. 151, 21 Mor. Min. R. 113 (1900).

Title can only be acquired by discovery and occupation on the unoccupied lands of the government. No title by discovery can be had by an entry within the surface lines of patented lands. Moyle v. Bullene, 7 Colo. App. 308, 44 Pac. 69 (1896).

Title to a mining claim can only be initiated by discovery upon the unoccupied lands of the government. No rights are acquired by entry within the surface lines of patented lands or other lands which are withdrawn from the body of public lands. McPherson v. Julius, 17 S. D. 98, 95 N. W. 428 (1903).

G. Within Town Site.

The fact of discovery being made within the patented limits of a town will not void a location where it was well known that a mineral bearing vein existed at that place long prior to the application for the patent. Moyle v. Bullene, 7 Colo. App. 308, 44 Pac. 69 (1896.).

Discovery must be made outside the limits of the town site where the claim lies partly within it. In re Laney, 9 Land Dec. 83 (1889).

with the recorder of the district in which the claim lies within ninety days from the date of the discovery of the claim, but did not make a discovery of mineral on or within the exterior boundaries of the claim, such as would justify a man of ordinary prudence, not necessarily a skilled miner, in the expenditure of his time and money in the development of the property, then you should consider the fourth question of this case, namely, that of possession.

You are instructed that a qualified locator shall mark the boundaries of a placer mining claim upon the ground, so that the same could be readily traced, as heretofore explained to you, and shall record his notice of location as heretofore explained to you, and shall enter into the actual possession of the claim for the purpose of making a discovery of mineral thereon, so long as he remains in the actual possession of the claim, and is engaged, in good faith, in the labor of making a discovery, he is entitled to the protection of the law. You are instructed that in this case if you find and believe from a fair preponderance of the evidence that

As to mining location not being affected by subsequent town-site patent, see note to Golden v. Murphy, p. ——, vol. 3, this series.

As to effect of town-site patent on mining location, and authority of land office department, see note to Butte City Smoke House Lode Cases, *post*, p. 520.

H. On Boundary of Claim.

A discovery shaft partly on hostile ground does not invalidate the claim if it shows mineral within the boundaries of the claim to which it relates. Healey v. Rupp, 28 Colo. 102, 63 Pac. 319, 21 Mor. Min. R. (1900).

That a portion of the discovery is situated upon an adjoining claim will not render a location based thereon invalid. Upton v. Larkin, 7 Mont. 449, 17 Pac. 728 (1888).

Where the discovery shaft is on the line of the claim, thus partly on and partly off the clear ground, the location will be sustained. Upton v. Larkin, 7 Mont. 449, 17 Pac. 728, 15 Mor. Min. R. 404 (1888).

The fact that the discovery shaft is partially within the boundaries of an adjoining claim is of no consequence, provided that portion within the boundaries of the location is of such dimensions as that it was in reality a shaft sunk upon that ground, a shaft large enough so that a miner could work in that portion included within the location sought to be based thereon. Nichols v. Williams, 38 Mont. 552, 100 Pac. 969 (1909).

A discovery shaft sunk so that one of the end lines of the claim ran through it is sufficient to support a location, and said location cannot be impaired by a subsequent location which overlaps the former and includes the discovery shaft. Tiggeman v. Mrzlak, 40 Mont. 19, 105 Pac. 77 (1909).

I. Within Another Claim.

A location cannot be based upon a discovery shaft situated upon a claim previously located. Gwillim v. Donnellan, 115 U. S. 45, 5 Sup. Ct. 1110, 29 L. Ed. 348 (1884); Little Pittsburg Consol. Min. Co. v. Amie Min. Co., 5 McC. 298, 17 Fed. 57 (1883); Erwin v. Perigo, 93 Fed. 608, 35 C. C. A. 482 (1899), affirming 85 Fed. 904 (1898); Crown Point Min. Co. v. Buck, 97 Fed. 463, 38 C. C. A. 278 (1899); Branagan v. Dulaney, 2 Land Dec. 744 (1884); In re Williams, 20 Land Dec. 458 (1895).

at the time the defendant James Kelly attempted to initiate his mining location, on the 26th day of June, 1905, and at the time of his entry upon the ground on July 1, 1905, the plaintiffs in this case personally, or by their agents or servants, were in the actual possession of the ground in dispute, and were actually in good faith engaged in the development thereof, and seeking to make a discovery of gold and other mineral thereon, then, although they had not then made a discovery of gold, they were entitled to the possession of the ground, and had such a legal estate therein as would justify them, by reason of such actual possession and labor, to a verdict in this case. And you are further instructed that if you shall find and believe from the evidence in this case that on the 26th day of June, 1905, when the defendant first attempted to initiate his claim to the ground in dispute, and on July 1, 1905, when he entered into possession thereof, the plaintiffs were not in actual possession of the ground in dispute, and were not then actually and in good faith endeavoring to develop the same, and to make a discovery of gold thereon,

A location based upon a discovery made within the limits of another existing valid location, is void. Tuolumne Consol. Min. Co. v. Maier, 134 Cal. 583, 66 Pac. 863 (1901); Michael v. Mills, 22 Colo. 439, 45 Pac. 429 (1896); Sullivan v. Sharp, 33 Colo. 346, 80 Pac. 1054 (1905); Sierra Blanca Min. & Reduction Co. v. Winchell, 35 Colo. 13, 83 Pac. 628 (1905); McPherson v. Julius, 17 S. D. 98, 95 N. W. 428 (1903).

Where discovery is made within the limits of a located claim, before it can avail the discoverer anything it must appear that the lode or vein discovered is entirely separate and distinct from that upon which the prior location is based. Atkins v. Hendree, 1 Idaho 95 (1867).

The discovery must be made upon unoccupied land and upon the ground located. A discovery made upon land located is not sufficient as the basis of another location. The Golden Terra Min. Co. v. Mahler, 4 Pac. Coast L. J. 405, 4 Mor. Min. R. 390 (Dist. Ct. Dakota, 1879); McKinstry v. Clark, 4 Mont. 370, 1 Pac. 759 (1882); Upton v. Larkin, 5 Mont. 600, 6 Pac. 66 (1885).

Discovery made within boundaries of an adjoining prior location is void, and will not sustain a location. Tiggeman v. Mrzlak, 40 Mont. 19, 105 Pac. 77 (1909).

Discovery made within the limits of an existing valid location is void, and not sufficient as the basis of a location. Watson v. Mayberry, 15 Utah 265, 49 Pac. 479 (1897); Reynolds v. Pascoe, 24 Utah 219, 66 Pac. 1064 (1901); Lockhart v. Farrell, 31 Utah 155, 86 Pac. 1077 (1906).

Where a location is void by reason of the discovery upon which it was based having made upon a valid location, it is not validated by the abandonment of the location upon which the discovery was made. Lockheart v. Farrell, 31 Utah 155, 86 Pac. 1077 (1906).

No location can be made based upon a discovery or staking upon ground covered by existing unexpired and unabandoned location. In re Haight et al., Ont. Min. Com. Cas. 32 (1906).

A staking upon an original discovery by a party other than the original discoverer, without any new or further discovery of his own, is invalid. In re McNeil et al., Ont. Min. Com. Cas. 262 (1908), 17 O. L. R. 621, 13 O. W. R. 6 (1908).

A mining claim cannot be based upon discovery made upon ground covered by

but that on July 1, 1905, the defendant James Kelly entered peaceably and without force or violence, and that the ground was then unoccupied and vacant, you are instructed that the plaintiffs would not be entitled to recover by reason of any alleged prior actual occupation of the ground, and you should find for the defendants upon that question.

You are further instructed, however, that where a prospector has marked the boundaries and recorded, as heretofore I have instructed you, and is in actual possession, and in good faith attempting to comply with the mining laws in the matter of making a discovery, and has in good faith temporarily gone away from his claim for the purpose of purchasing provisions or supplies, or for any other temporary purpose, and intending to return and resume his actual occupation, possession, and labors, then I instruct you that such a temporary absence is not to be considered an abandonment of his rights to the ground, and you are instructed that any one who should enter upon his ground during such temporary absence could not initiate any right thereto. You are instructed

an existing claim. In re Sinclair, Ont. Min. Com. Cas. 179 (1908).

A discovery cannot be appropriated while a staking by the original discoverer exists and he is prosecuting proceedings to complete the recording of his claim. In re Wright et al., Ont. Min. Com. Cas. 373 (1909).

As to claim in actual possession of prospector cannot be located by another, see paragraph VI of note to Dwinnell v. Dyer, p. ——, vol. 3, this series.

VIII. Effect of Loss of Discovery.

A. In General.

The loss of that portion of the ground whereon the discovery is situated renders the location invalid. The loss of the discovery forfeits the claim. Gwillim v. Donellan, 115 U. S. 45, 5 Sup. Ct. 1110, 29 L. Ed. 348 (1884); Miller v. Girard, 3 Colo. App. 278, 33 Pac. 69 (1893); Armstrong v. Lower, 6 Colo. 393 (1882); Girard v. Carson, 22 Colo. 345, 44 Pac. 508 (1896); Watson v. Mayberry, 15 Utah 265, 49 Pac. 479 (1897); but if the ground upon which the discovery shaft is situated has been judicially determined to belong to the applicant, the claim is not vitiated. Mitchell v. Brovo, 27 Land Dec. 40 (1898); nor where a junior locator is permitted to obtain a patent under agreement that he will convey the ground containing the discovery shaft to the senior locator. In re Duxie Lode, 27 Land Dec. 88 (1898).

B. By Change of Boundaries.

If the boundaries of a claim as originally located are changed after the recording of the original location certificate, so as to leave the discovery shaft outside, the validity of the location cannot be sustained. McGinnis v. Egbert, 8 Colo. 41, 5 Pac. 652 (1884).

Where the discoverer, finding his location to be excessive, draws in his lines, and in so doing excludes the discovery shaft, the whole claim is not vitiated if he makes another discovery before the rights of third parties intervene. Waskey v. Hammer, 170 Fed. 31, 95 C. C. A. 305 (1909).

C. By Sale.

Where ground has been properly located, the locator may sell any portion thereof, and the fact that he sells the portion upon which the discovery shaft is situated will not preclude him from obtaining a patent for the balance. Lit-

however that you should view the matter of the absence of the prior occupant and the character of his actual occupancy and possession with care and caution, and if you shall find and believe from the evidence in this case that the plaintiffs, by themselves or their agents, were not in actual possession of the premises in dispute in good faith, and had not temporarily left the same in good faith, but were merely holding the ground by reason of their former marking and recording for speculative purposes, and without being in the actual possession thereof in good faith, and attempting to make a valid discovery of mineral thereon, then you should find against them upon that question; but if you shall find that they had previously actually made a discovery as defined to you, or that they were in such actual possession in good faith, and that their absence was a temporary one in good faith, for the purpose of purchasing provisions and supplies, with an honest intention to return to the ground and resume labor thereon, then you should find upon that question for the plaintiffs.

You are instructed that in considering the question of what constitutes possession you should consider it from the standpoint of the ground. That in controversy is a placer mineral claim. If it were a homestead,

tle Pittsburgh Consol. Min. Co. v. Amie Min. Co., 5 McC. 298, 17 Fed. 57 (1883).

Where land is located by several parties as an association claim and thereafter a particular and specific part thereof is sold to a third party, a discovery made by such party upon the part of the property so conveyed to him cannot be held to redound to the benefit of the associates who have parted with all interest in that portion of the property where the discovery is made. Merced Oil Min. Co. v. Patterson, 153 Cal. 624, 96 Pac. 90 (1908).

But where a specific part of an association claim is sold to a third person, with express covenants and agreements that any work done or discovery made thereon would be for the benefit of all the associates and the whole claim, a discovery upon the portion so sold will inure to the benefit of all the associates and the whole claim; for as it is competent for the locators to employ a third person to do the work necessary to a discovery, therefore they might make such agreement with the person to whom they conveyed a certain portion of the property. Merced Oil Min. Co. v. Patterson, 153 Cal. 624, 96 Pac. 90 (1908).

D. By Subsequent Patent to Another.

Where a locator permits the ground containing his discovery shaft to be patented to an adverse party, the whole location becomes void. Gwillim v. Donnellan, 115 U. S. 45, 5 Sup. Ct. 1110, 29 L. Ed. 348 (1885).

The patenting of the land whereon the discovery shaft is situated to a third person renders the location void. Girard v. Carson, 22 Colo. 345, 45 Pac. 508 (1896); Miller v. Girard, 3 Colo. App. 278, 33 Pac. 69 (1893).

Where a discovery shaft is sunk upon ground which is thereafter patented to another person, the whole location becomes invalidated unless a new discovery shaft be sunk. Girard v. Carson, 22 Colo. 345, 44 Pac. 508, 18 Mor. Min. R. 346 (1896).

Where that part of the land claimed upon which the discovery shaft is

possession would be shown by erecting a habitable house, by fencing, plowing the land, raising crops, and other acts such as a farmer usually performs under similar circumstances. But it is not necessary to fence a mining claim, to plow or raise crops thereon. A placer mining claim in this camp is possessed by marking the boundaries, recording, and making a discovery of mineral, by sinking holes to discover the pay-streak, by hoisting pay-dirt, sluicing and cleaning up. Miners sometimes erect tents or houses and reside on the claim, but such acts are not necessary to constitute a legal possession, though when performed in addition to other acts usually done in mining they are evidence of possession. You are instructed that if you shall find from the evidence in this case that during the months of May and June, till June 26, 1905, the plaintiffs by their agent, Kelsey, actually occupied the ground in controversy in this action by living there in a tent, and by cooking and sleeping thereon, and by working in good faith to develop the claim as a mining claim, and by sinking holes thereon to discover gold, and generally in doing such acts as miners under such circumstances are obliged to do to discover gold on a claim and develop it, such occupancy and labors in good faith would constitute an actual possession.

situated was excluded from the claim in favor of a subsequent locator, and there is no proof of a discovery on the ground within the claim, the location is insufficient, and will not support an application for patent. In re Antediluvian Lode, 8 Land Dec. 602 (1889); In re Independence Lode, 9 Land Dec. 571 (1889); In re Lone Dane Lode, 10 Land Dec. 53 (1890).

Where the discovery is situated within ground afterwards patented to another locator, the whole location will not be held void if a discovery has been made on the claim outside the disputed ground. It will be held valid as to such portion as is outside the conflicting location. Perigo v. Erwin, 85 Fed. 904 (1898); Silver City Gold & Silver Min. Co. v. Lowry, 19 Utah 334, 57 Pac. 11 (1899).

E. Discovery on Remainder.

Where the portion of the location containing the discovery shaft has been excluded, a discovery must be shown on the remaining portion or application for patent will be denied. In re Cayuga Lode, 5 Land Dec. 703 (1889).

Where part of a claim containing the discovery is excluded, there must be a showing of mineral in the remaining portion. In re Cayuga Lode, 5 Land Dec. 703 (1889); In re Dane Lode, 10 Land Dec. 53 (1890); In re Antediluvian Lode, 8 Land Dec. 602 (1889); In re Independence Lode, 9 Land Dec. 571 (1889); In re Laney, 9 Land Dec. 83 (1889).

IX. By Knowledge and Adoption.

The vein must be known by the locator to exist at the time of making his location, but it is not necessary that he should be the first discoverer thereof. Jupiter Min. Co. v. Bodie Consol. Min. Co., 7 Sawy. 96, 11 Fed. 666, 4 Mor. Min. R. 411 (1881).

It is not necessary that the locator of a mining claim should be the first discoverer of the vein or lode in order to make a valid location. It is sufficient if it be clearly shown that the locator knew at the time of making his location that

But you are instructed that merely placing a tent and a few tools and a small supply of provisions upon a placer mining claim do not, alone and of themselves.constitute actual possession thereof; and if you shall find and believe from the evidence in this case that after the Kelsey tent, tools, and provisions were thrown off the Hill claim by Jack Pounder, the same remained unused and scattered, resting upon the surface of the upper half of the Charlton claim, and upon that portion in dispute in this action, and that when the defendant Kelly entered thereon on June 26, 1905, no use had been made thereof in working the claim or in developing the same, or seeking to use it as a mining claim, and that the tent was unoccupied, or only so occupied casually, and not for the purpose of aiding in developing the mining claim, then such tools, provisions, tent, and casual occupancy did not constitute actual possession of the placer mining claim in good faith under the law, and would not be such an actual possession as would justify you in finding on that point for the plaintiffs. If a party goes upon the mineral lands of the United States, and either establishes a settlement or works thereon without complying with the requirements of the mining laws, and relies exclusively upon his possession or work, a second party, who locates peaceably a mining claim covering any portion of the same ground, and in all respects complies with the requirements of the mining laws, is entitled to the possession of such mineral ground to the extent of his location as against the prior occupant, who is, from the time said second party has perfected his location, and complied with the law, a trespasser.

You are instructed that a mere possession of a piece of mining ground is only good as against an intruder, but not against one who subsequently located the same in compliance with the mining laws. The government requires something more from one who seeks to acquire mining ground than a mere occupancy thereof in a tent with his tools and provisions; it requires work in developing the claim. But when that work has proceeded to the point where he has marked the boundaries so that

there had been a discovery of a vein or lode within its limits. Book v. Justice Min. Co., 58 Fed. 106, 17 Mor. Min. R. 617 (1893).

Where a locator attempts to adopt and appropriate a prior discovery made by another, he must show that it was known to him. Nevada Sierra Oil Co. v. Home Oil Co., 98 Fed. 673, 20 Mor. Min. R. 283 (1899).

The way in which knowledge of the mineral in the claim is obtained is immaterial. Thus, where an employee ascertained that his employer had mined beyond his lines into vacant ground, it was held he was not precluded from locating a claim which covered such workings. Thallman v. Thomas, 111 Fed. 277, 49 C. C. A. 317 21 Mor. Min. R. 573 (1901).

A discovery may be made by one party and subsequently by another, and in such event the first discoverer obtains no rights if he fails to make a valid lo-

they can be readily traced, has recorded his location notice, and made a discovery of mineral thereon, as I have heretofore instructed you, it is sufficient work to perfect his location; but until those three acts are consummated, the possession, to exclude other prospectors, must be actual, continuous, and in good faith, subject, of course, to reasonable absences for the purpose of renewing the miner's supplies, or otherwise aiding him in his work of development. But if, even being in possession, he stands by and allows others to enter upon his claim, peaceably and without violence, and makes no effort to continue his work, and the subsequent prospector complies with the law by marking and recording, and first discovers mineral on the ground, the law gives such first discoverer a title to the claim and mineral thereon, against which the mere possession of the surface cannot prevail; and if you shall, from the evidence in this case, so find the facts to be, then your verdict on that point should be for the defendants and against the plaintiffs.

If you shall find and believe from the evidence in this case that the plaintiffs had not, prior to the entry of the defendant Kelly on the area of ground in dispute, made a discovery of gold sufficient to satisfy the law, then I instruct you that, to exclude the defendant Kelly from a peaceable entry upon the ground to locate it as a mining claim, the plaintiff's possession must have been actual, by the presence of themselves or agents on the ground, in good faith seeking to develop it by making a discovery of mineral thereon. Mere casual visits to the ground by Kelsey, plaintiffs' agent, and the leaving upon the ground, unused, of a tent, tools, and provisions, would not be such actual possession as would exclude the peaceable entry of defendant, and if you so find the facts from the evidence in this case you should find against the plaintiffs on that point.

cation and the second discoverer does make such location. Willeford v. Bell (Cal.), 49 Pac. 6 (1897; not officially reported); Conway v. Hart, 129 Cal. 480, 62 Pac. 44 (1900).

While technically the finding of a vein in the discovery shaft of an abandoned claim may not constitute a discovery, a valid relocation may be made under the Colorado Statute, by one finding such vein. Armstrong v. Lower, 6 Colo. 393, 15 Mor. Min. R. 631 (1882).

Mere knowledge of a former discovery is insufficient. In order to avail him it must be adopted by the locator as his discovery, upon which he bases his location. McMillen v. Ferrum Min. Co., 32 Colo. 38, 74 Pac. 461, 105 Am. St. Rep. 64 (1903).

RISCH et al. v. BURCH.

[Supreme Court of Indiana, May 23, 1911.]

— Ind. —, 95 N. E. 123.

1. Injunction—Threatened Oil Well Enjoined.

A bill to quiet title alleging in addition that the defendants have entered upon the land with a drilling rig and are threatening to drill for oil is sufficient to warrant a temporary injunction against such trespass.

2. Same—Temporary Injunction—Sufficiency of Complaint.

On appeal from an interlocutory order granting a temporary injunction, the sufficiency of the complaint will not be subjected to any technical tests when questioned first in the supreme court.

3. Same—Temporary Injunction Discretionary.

The granting of a temporary injunction to maintain the *status quo* until final hearing, rests in the sound discretion of the trial court and will be justified where the evidence shows a case worth investigating.

4. Forfeitures—Oil and Gas Contracts.

Oil and gas leases or contracts are not subject to the rule that forfeitures are not favored, and provisions looking towards a forfeiture are generally held to be for the benefit of the landowner and clearly enforceable.

5. Oil and Gas Contract Construed—Mere Option.

An oil and gas contract providing that in case no well is commenced within 120 days the grant shall become void unless the operator shall pay $20 each month thereafter delayed, held not to constitute a lease but to be a mere option for exploration, subject to expiration upon failure to pay in advance.

Appeal from Circuit Court, Pike County; John L. Bretz, Judge.

Action to quiet title and for injunction by Amos Burch against Henry Risch and others. Temporary injunction granted. Defendants appeal. Affirmed.

For appellants—Samuel Emison, Leroy Wade and Robinson & Stilwell.

For appellee—Wilson & Brumfield and Richardson & Taylor.

COX, J. This is an appeal from an interlocutory order granting a temporary injunction to appellee restraining appellants from drilling an oil or gas well on the lands of appellee until the final hearing of the cause instituted by him against them to quiet his title to such lands, and

NOTE.

As to the vesting of title under an oil lease being contingent upon the discovery of oil, see note to Steelsmith v. Gartlan et al., 19 Mor. Min. Rep. 315.

for a permanent injunction. The cloud on his title against which appellee is seeking relief grows out of a contract between appellee and appellants for the exploration of appellee's lands for oil and gas by appellants.

The assignments of error deny both the sufficiency of the complaint and the evidence to sustain the action of the trial court in granting the temporary injunction. The complaint, the sufficiency of which is questioned first in this court, contains all of the allegations necessary to make a good short-form complaint to quiet title to real estate, and is admittedly good to secure that relief as against a demurrer for want of facts. To these allegations are added the following: "That said defendants have unlawfully entered upon said land with what is known as drilling rig, or outfit, and placed the same in position thereon for the purpose of drilling an oil and gas well on said land, and are intending and threatening to drill such well thereon and will so drill same, unless restrained from so doing." The conclusion is a prayer for an order restraining defendants pending the hearing, and for a perpetual injunction and the quieting of the plaintiff's title as final relief. The time of the hearing for the temporary injunction was agreed upon and the matter was submitted to the trial judge upon the verified complaint and evidence from both sides.

It appears that the appellee, then the owner and in possession of the real estate in controversy, consisting of forty acres, in Pike County, on December 15, 1909, entered into a contract with appellants for the exploration of the land for oil and gas. This memorandum of agreement, as it is designated therein, omitting certain wholly immaterial parts, reads as follows: "That the said party of the first part, for and in the consideration of the sum of forty ($40.00) dollars in hand paid, the receipt of which is hereby acknowledged, and of the covenants and agreements hereinafter contained, hereby grant and convey to the said party of the second part, all of the oil and gas in and under the following described premises, together with the exclusive right to enter thereon at all times for the purpose of drilling and operating thereon, and of producing therefrom said oil and gas, and to erect and maintain all buildings and structures and to lay and maintain all surface rods and pipes necessary for the production or transportation of oil and gas to, from or upon such premises as may be operated by said second party. Excepting and reserving, however, to the party of the first part the one-eighth (⅛) part of all oil produced and saved from said premises hereinafter described, to be delivered in pipe line or tank with which second party may connect said wells, namely: [Here follows a description of the premises.] To have and to hold the above-described premises for a period of one year from the date hereof and as much longer as gas and oil is found in paying quantities on said premises or the rentals paid as herein provided for,

upon the following conditions: If gas only is found, second party agrees to pay first party two hundred dollars each year for the gas from each well while the same is being marketed off the premises, the first party to have the gas free of cost to heat all stoves and light and jets in dwelling house on said premises during the same time. * * * In case no well is commenced on said premises within 120 days from this date, then this grant shall become null and void unless second party shall thereafter pay the first party at rate of twenty ($20.00) dollars each month thereafter such commencement is delayed, payment to be made by depositing the amount thereof in First Nat. Bank of Winslow or by check delivered to the first party."

It is conceded that no well was begun within 120 days from the date of the agreement, December 15, 1909, and that nothing was done towards doing so within that time. Thereafter the evidence warrants the statement that on or before May 15, 1910, appellants paid to appellee $20 on the contract, and on or before June 15th another $20; that no further payments were made to appellee, and that no deposits were made in the First National Bank of Winslow by appellants for him; that as late as July 18th, appellee, not having received additional payments, went to the Winslow bank and found no money from appellants there for him; that on July 19th, after finding no money in the bank for him, appellee made a tentative agreement with another person for the oil and gas rights in his land on more favorable terms, and on that day notified appellants that their rights therein were at an end; that the following day appellee closed his tentative agreement with the third party, and received among other more favorable considerations for the oil and gas rights in his land a large cash payment; that appellants, still asserting the existence of their rights under the agreement, sent a check to the Winslow bank for appellee July 19th, and on July 21st they moved a drill rig on the land preliminary to carrying out the expressed intention of drilling a gas and oil well thereon, and this was the first move they had made to carry out their implied agreement to make exploration of appellees' land. This action was begun July 27, 1910.

While it is not contended by counsel for appellants that the complaint is lacking in any essential averment to make it good to quiet title, it is earnestly contended that it does not contain sufficient allegations to authorize the granting of a temporary injunction. That ancillary injunctive relief may be granted to prevent a trespass to land in aid of a plaintiff in possession in an action to protect his possession or to quiet his title, where the objective of the trespass is to remove a part of the substance of the inheritance, cannot be doubted. Such relief has been granted to prevent the removal of trees, coal, valuable ores, asphaltum, stone, and clay. Thomas v. Oakley, 18 Ves. Jr. 184; Bates v. Slade, 76 Ga. 50;

Leake v. Smith, 76 Ga. 524; More v. Massini, 32 Cal. 590. That such a relief should be granted against a threatened trespass the purpose of which is the removal of oil and gas underlying the surface would seem to be still clearer for obvious reasons based on their peculiar nature.

The charge in the complaint that appellants had unlawfully entered upon the lands of appellee with a drilling rig, and had placed the same in position thereon for the purpose of drilling an oil and gas well on the land, and were intending and threatening to drill the well, and would do so unless restrained, necessarily includes the purpose on the part of the appellants to remove from the depths of the land any oil and gas which might be discovered.

On appeal from an interlocutory order granting a temporary injunction, the question of the sufficiency of the complaint is not deeply involved, and it will not be subjected to any technical tests when questioned for the first time in this court. The granting of a temporary injunction to maintain the *status quo* until the final hearing rests in the sound discretion of the trial court, and this discretion will not be interfered with on appeal unless it is made to appear that the court's action was arbitrary or a clear abuse of the discretion vested in it. The rule is that, to authorize the court to grant such relief, it is not necessary that a case shall be made out that will entitle the plaintiff to relief at all events at the final hearing. It is enough if the court finds upon the pleadings and the evidence a case which makes the transaction a proper subject for investigation in a court of equity. Spicer v. Hoop (1875), 51 Ind. 365; People's Gas Co. v. Tyner (1891), 131 Ind. 277, 31 N. E. 59, 16 L. R. A. 443, 31 Am. St. Rep. 433; Home, etc., Co. v. Globe, etc., Co. (1896), 146 Ind. 673, 45 N. E. 1108; Gagnon v. French Lick, etc., Co. (1904), 163 Ind. 687, 72 N. E. 849, 68 L. R. A. 175; City of Laporte v. Scott (1905), 166 Ind. 78, 76 N. E. 878.

Counsel for both appellants and appellee discuss the proper construction of the contract for gas and oil privileges involved in this case as controlling the question of the validity of the order granting the temporary injunction, and it is true that upon that construction the ultimate right of appellee to succeed in his action depends, but it does not necessarily follow that the propriety of granting the temporary injunction depends on appellee's ultimate right to recover. The parties herein are at issue upon a question of legal rights, and it was fairly necessary in justice to both for the court to preserve their rights *in statu quo* until those rights could be finally determined. It rested in the court's discretion to consider the relative harm and benefit, convenience and inconvenience which might result to the parties from granting or withholding the writ and to determine that appellee would suffer greatest injury and inconvenience from the court's inaction. High on Injunctions (4th Ed.) § 13. It

cannot be said that the facts involved would not have sustained the court's action even without a construction of the contract favorable to appellee.

But counsel on both sides treat the construction of the contract as involved, it being contended on the part of the appellants that the monthly payments of $20 were to be considered rent which, to save appellants' rights, need not necessarily be paid until the end of the year, or, at most, at the end of each month; while for appellee the contention is that under the authority of Dill v. Fraze (1907), 169 Ind. 53, 79 N. E. 971, these payments must be held to be payable in advance, and, as there was a failure to pay, it was the right of the appellee, appellants not having taken any steps to drill a well, to declare a forfeiture. To save further contention we decide the question. We think the contention of appellee must prevail.

Oil and gas leases or contracts are in a class by themselves, and the ordinary rule that forfeitures are not favored does not apply with full force to them if at all. The provisions for a forfeiture usually found in them are generally held to be for the benefit of the landowner and clearly enforceable by him where the lessee has done nothing to carry out the purpose of exploration, and has failed to make payments for the right to do so. In Ohio Oil Co. v. Detamore (1905), 165 Ind. 243-249, 73 N. E. 906, in speaking of a similar contract, the court said: "In this, as in other contracts of its class, the manifest purpose of the parties was exploration, and the mining of oil and gas. But here, to say the most of it, the grant is inchoate, and not absolute. It purports upon its face to grant all the oil and gas under the land, but in effect provides that, in consideration of $120, the grantee shall have six months in which to decide whether it will accept the grant by entering into possession and beginning the work of exploration. Viewed from end to end, the contract amounts to nothing more or less than a six-months option whereby the grantor bound himself not to lease the premises to another, and to give the grantee that length of time to consider and determine whether it would undertake the development of the land upon the terms named. If the grantee had decided in the affirmative, and had entered upon the land, and proceeded with the execution of the contract, and completed a well within the option period, then acceptance would have been complete, and the grant effective." In Dill v. Fraze, *supra,* a suit to cancel a gas lease, it was said: "The agreement contains an express provision for a forfeiture if a well is not completed within 60 days, unless the second party thereafter pays at the rate of $40 per year for each year such completion is delayed. The unit of payment was $40, and the question arises whether such payment was to be made in advance. While the ordinary rule governing rentals is that payment in advance is not required, unless so stipulated

in the contract, yet, as the endeavor of the courts in the enforcement of agreements is to effectuate the intent of the makers, we are of opinion that in the circumstances of this case it should be held that it was the purpose of the parties that payment should be made in advance. * * * The contract before us distinctly contemplates that a forfeiture should result at the end of sixty days (a well not being then completed), unless the operator should pay the consideration for delay. This plainly required him to become an actor if he would save his rights. In such a case the owner has the privilege of declaring the lease forfeited at the end of said time, except as the other party pays the sum stipulated for the delay." It is further held in Ohio Oil Co. v. Detamore, *supra,* that the failure of the lessee to make payments provided to extend the time for drilling similar to the monthly payments of $20 each provided in the contract in suit for that purpose brought the option to an end.

The contract in the case before us contains no express covenant on the part of appellants to be performed by them prior to such time as they might discover oil or gas. They do not expressly agree to drill a well, nor do they promise to pay the designated $20 per month in advance or at any time. And, taking into consideration the situation of the parties and the subject-matter of the contract, we are constrained to hold on the authority of the cases last above cited that the contract in the case under consideration did not create the relation of landlord and tenant, but was a mere option granted to appellants by appellee, for a valid consideration, for the exclusive right to explore his land for oil and gas which by its very terms was to expire by the inaction of appellants at the end of 120 days; that by the payment of $20 "each month thereafter" appellants could procure the extension of the option for a month at a time; that these payments were to be made in advance; and that, upon the failure of the appellants to act either by beginning a well or making a payment, appellee had the right to declare their rights under the contract at an end.

The 120 days from the date of the contract ended with the 14th day of April, 1910. Two monthly payments of $20 each were made by appellants, and, treating the monthly payments as being required to be paid in advance, appellants were delinquent in two payments when appellee gave them notice that their rights were forfeited. As said in Dill v. Fraze, *supra,* at page 58: "There is little or no reason for the interference of a court of equity to prevent a forfeiture before operations have begun, where the operator has sinned away his opportunity under the contract. The wandering and vagrant character of oil and gas is recognized by the courts, and contracts pertaining thereto are to be construed with reference to the known characteristics of the business."

The order of the lower court granting the temporary injunction is affirmed.

RUPEL et al. v. OHIO OIL CO. et al.

[Supreme Court of Indiana, May 23, 1911; on petition to recall opinion, June 2, 1911.]

— Ind. —, 95 N. E. 225.

1. **Appeals and Errors—Error Waived.**
Where appellants do not state any proposition or cite any authority in support of an assignment of error, it is deemed waived.

2. **Same—Oral Argument—Request.**
Oral arguments should be requested by written application within the time allowed for filing briefs; otherwise, the court will refuse the application in its discretion.

3. **Life Tenant—Right to Explore for Oil.**
A life tenant has no right to grant the right of exploration for oil and gas and to profit from its discovery.

4. **Injunction—Reversioner—Right to Oil and Gas.**
The owner of the reversion may enjoin the invasion of his right to oil and gas on his land.

5. **Waste—Right of Action.**
A reversioner may recover for waste from one claiming under the life tenant or from a stranger.

6. **Same—Account without Injunction.**
Equity will give an account for past waste even without an injunction, if an action at law is inadequate.

Appeal from the Circuit Court, Jay County; J. F. La Follette, Judge.

Action for waste by Martin L. Rupel and others against the Ohio Oil Company and others. Judgment for defendants. Plaintiffs appeal. Reversed.

For appellants—S. A. Whipple and Emerson McGriff.

For appellees—Simmons & Dailey.

COX, J. The appellants, Martin L. Rupel, Isaac Rupel, Jacob Rupel, and Sarah Fields, are, together with appellees James Rupel and Rachel Artwine, the owners in remainder as tenants in common, each owning a one-sixth interest, of certain lands in Jay County. Appellee Mary Rupel, their mother, is the owner in possession of the life estate

NOTE.

For other cases on the rights of the tenant for life and of a cotenant in mineral lands, see notes to Williamson et al. v. Jones et al., 19 Mor. Min. Rep. 19.

in these lands. As such life tenant in possession, she, without the remainder-men joining therein, sought to grant to the assignor of the appellee, the Ohio Oil Company, by contract in writing executed January 20, 1891, the exclusive right to enter upon these lands and explore for, and to remove therefrom, the oil and gas found. Their contract contained the usual stipulations for cash payments and for royalties, to be paid by the explorer to Mary Rupel, the life tenant, the right to lay pipes for oil and gas lines and the obligation to bury them, and to pay damages for injuries to timber and crops, to leave the fences and drains in as good condition as found, and to so locate wells as to protect buildings on the premises. The appellee, the Ohio Oil Company, as the assignee of this contract, entered upon the lands thereunder January 1, 1902, drilled wells, and removed large quantities of oil up to the time this action was brought, September 5, 1905. The appellants brought this action by complaint in two paragraphs against appellee oil company to recover damages in the nature of waste of their inheritance. They joined Mary Rupel, the life tenant, and James Rupel and Rachel Artwine, their cotenants, as defendants to answer as to their interests, if any, in and to the oil removed or to the proceeds from the sale of it. The first paragraph set out in substance, amongst other things, the source of the appellants' title at length, the status of Mary Rupel as life tenant, that of James Rupel and Rachel Artwine as that of cotenants of plaintiffs, the execution of the contract by the life tenant granting the right to one Wolf to explore the lands for oil and gas, the assignment of the same to the Ohio Oil Company, the knowledge of the oil company of the status of Mary Rupel and of appellants when the contract was executed by her and at the time of their entry, the entry upon the premises by the oil company, the drilling of wells thereon, and removal by it therefrom of many thousands of barrels of oil; that the execution of the contract, the assignment, and the entry by the oil company and removal of the oil were without the knowledge or consent of appellants; that the oil company had not accounted to or paid appellants for the oil or any part of it, but converted and appropriated it; that, by reason of the wrongful taking of the oil from the land, the reversion of appellants was greatly injured and reduced in value, and great waste thereof committed by the oil company. There was in conclusion a prayer for judgment against the oil company in the sum of $100,000.

The second paragraph was similar in its allegations of facts, except that the source of title was not set out in full, nor was the contract, and the conclusion was that appellants had demanded an accounting, settlement, and payment of the oil company for the oil so taken before the bringing of the action, which was refused, and that, by reason of the

appropriation of the oil as alleged, appellants had been damaged by the oil company, and by reason thereof it was indebted to appellants in the sum of $100,000, for which judgment was demanded. A separate demurrer for want of facts by the oil company was sustained to each paragraph of the complaint, as were joint demurrers for the same cause by the other three defendants, and plaintiffs, refusing to plead further, appeal from the judgment thereupon rendered against them. Errors are properly assigned on the rulings of the trial court on these demurrers.

Appellants' counsel have not stated in their brief any proposition or point or cited authority in support of their assignment of error that the court erred in sustaining the demurrers of Mary Rupel, James Rupel, and Rachel Artwine, and therefore, under the rules and decisions of this court, this assignment is deemed waived, and will not be considered.

It remains only to determine whether the complaint or either paragraph stated a cause of action against the Ohio Oil Company. It is the contention of counsel for appellees that it is within the rights of a life tenant to make a valid contract to permit the search of the substance of the estate for oil and to profit therefrom when found. This contention is based on what seems to be the settled rule in this state that oil and gas which may underlie the real estate do not become the absolute property of the owner of the land until he has discovered them by exploration and mining his land and reduced them to his dominion. This is so because of their supposed wandering and vagrant character. But this rule of property does not in any way modify the general common law that the ownership of the fee of the surface of the earth carries with it the right to the minerals beneath, and the consequent right to extract them. This right is exclusive in the owner of the fee. The life tenant in possession has no such right, and, not having it, he cannot, of course, grant it to another. 16 Cyc. 625; Ohio Oil Company v. Indiana, 177 U. S. 190, 20 Sup. Ct. 576, 44 L. Ed. 729.

Where oil underlies the surface of land, it cannot be denied that for the time it is physically a part of it. To recover it from the earth requires an assault on the integrity of the estate like, if different in degree, to the taking of other minerals, and when recovered from the earth, it is as much property as any other mineral in, or on, or underlying the land; when severed from its physical connection with the earth it becomes personal property as other minerals do. The owner of the fee alone, or one to whom he has granted the right, may invade the substance of the inheritance to take one as well as the other. He may prevent one not entitled from taking one from the estate as well as the other, or, where the waste or trespass has been committed, he has his remedy in the one case as well as the other. 27 Cyc. 629, 630. In the case of Richmond Natural

Gas Co. v. Davenport (1905), 37 Ind. App. 25, 76 N. E. 525, it was held that the owner of the fee might enjoin the life tenant in possession and her lessee from drilling for and removing oil and gas from the estate as waste. In that case it was said: "It is settled by numerous decisions that the natural gas or the petroleum which may be under the surface, and not reduced to the actual possession of any person, constitutes a part of the land, and belongs to the owner thereof in such a sense that he has the exclusive right by operations upon his land to reduce such mineral substance to possession and use and enjoyment and to grant the privilege of doing so to other persons, though, until so reduced to possession, the mineral substance is subject to be taken by any other person by proper operations upon his own land, and that a person in possession who has such exclusive right in particular land, as owner of the land or as lessee or grantee with the privilege of extracting such minerals, may by injunction prevent operations for such purpose by others who have not rightfully acquired the privilege from the owner of the land in fee. The taking of these minerals by a stranger by means of wells made without right for such purpose constitutes a trespass, damages for which cannot be definitely measured. And the taking by one lawfully in possession of the surface, with right to enjoy the income and profits, but not the owner of the fee and not having received from such owner the privilege so to take the minerals—that is, by a tenant of the land for years or for life—constitutes waste." It has been held in this state that one who has been granted by the owner of the fee the exclusive right to take oil and gas from the land may enjoin the invasion of the right by a stranger. Indianapolis Natural Gas Co. v. Kibbey, 135 Ind. 357, 35 N. E. 392 (1893); Consumers' Gas Co. v. American, etc., Co., 162 Ind. 393, 68 N. E. 1020 (1903); American, etc., Co. v. Tate, 33 Ind. App. 504, 71 N. E. 189 (1904). It must necessarily follow that a like remedy would be available to the owner himself.

It is practically conceded by counsel for appellee that every owner of the fee has such a right in and control over the oil and gas underlying his land that the preventive remedy of injunction is his, but contend that, if he fails to deny access by the use of it, he cannot assert a right to compensation after the oil and gas have been wrongfully removed. This must lead to a position unmaintainable: That an owner who is present and has knowledge of a threatened injury to his estate, may prevent the injury, while an owner absent, with no knowledge of a threatened injury until after it has been fully accomplished, is remediless. The statement of the proposition is in itself a refutation of its soundness. The law is otherwise, and has long been so. Anciently in England by the common law and early statutes the remedies for waste were the writ *estrepe-*

ment and prohibition of waste to prevent a threatened waste, and the writ of waste for the recovery of the estate and of damages for waste committed. The ancient preventive remedies have given way to the more modern remedy of injunction now available in our practice. The writ of waste to recover damages for waste committed was succeeded by the common-law action on the case in the nature of waste, which, in turn, has become our code action for damages for waste or trespass in the nature of waste. 30 Am. & Eng. Encyc. of Law (2d Ed.), pp. 272-274; 22 Encyc. of Pl. & Pr. 1095 *et seq.;* Burns' Stats., 1908, §§ 288, 289,

At common law the reversioner might sue the life tenant for damages for waste, but, as privity of estate between the parties was necessary to the maintenance of an action for waste, he might not sue one claiming under the life tenant or a stranger. This rule, however, no longer prevails, and the modern action to recover damages may be maintained against the life tenant or a subtenant or a stranger. 22 Encyc. of Pl. & Pr., pp. 1095, 1107, 1108, and notes. In harmony with the rule that has always prevailed, it is held in this state that the reversioner may not only enjoin the commission of waste by the life tenant, but may recover damages for that already committed. Miller v. Shields (1876), 55 Ind. 71; Stout v. Dunning (1880), 72 Ind. 343; Robertson v. Meadors (1880), 73 Ind. 43. Indeed, the statute so provides specifically as to the action for damages. Burns' Stats., §§ 288, 289.

Equity will give an account for past waste, and, if it be of such a character that an action at law for damages will not give adequate relief, equity will give the remedy of account, even if an injunction may not be had. 30 Am. & Eng. Encyc. of Law (2d Ed.), p. 300; 16 Cyc. 644; 22 Encyc. of Pl. & Pr. 1135. A comparatively late case, that of Bender v. Brooks (Tex. 1910), 127 S. W. 168, was an action to recover the possession of a tract of land and for damages for oil taken therefrom, and the same rule of property in oil in the earth that prevails generally in this state and elsewhere was recognized. In the course of the opinion of the court it was said: "It is true that appellants, as owners of the land, had no specific title to the oil therein until it has been removed from the earth. * * * Appellants had the exclusive right as owners of the soil to take the oil therefrom; and the appellee by an invasion of their right and removal of the oil, no matter how innocently, could not acquire title thereto. It follows logically that since appellants owned this land from which appellee extracted the oil the oil so removed became and was the property of appellants so soon as it reached the surface. Therefore they had a right to recover their property or its value." It was further held in that case that an account should be taken to ascertain the damages. In the case of Marshall v. Mellon, 179 Pa. 371, 36 Atl.

201, 35 L. R. A. 816, 57 Am. St. Rep. 601, while recognizing the inherent difference between oil and other minerals in the earth which prevents an absolute ownership in the former until it is taken possession of, it was held that with respect to the rights and interests of life tenants and remainder-men there is no departure from the common-law rule that tenants for life only may not open new mines, or take minerals from the premises except in case of mines opened by the former owner, and that a life tenant could neither open oil and gas wells or grant the right to another. The case of Williamson v. Jones, 39 W. Va. 231, 19 S. E. 436, 25 L. R. A. 222, is to the same effect, that a life tenant or one claiming under him may not drill wells and take oil from the estate, and, when it is done, that the owner of the fee may enjoin the waste or trespass, and have an account for that committed. See, also, the further exhaustive consideration of the same case, 43 W. Va. 562, 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891; Gerkins v. Kentucky Salt Co., 100 Ky. 734, 39 S. W. 444, 66 Am. St. Rep. 370. We believe the cases and books cited indicate the law applicable to the case made by the two paragraphs of the complaint under consideration in this case, and it follows that the trial court erred in sustaining the demurrer of appellee oil company to each of them.

We are asked to determine a question of estoppel of appellants by knowledge of the operations of the oil company on the land in question. This we decline to do. No such question is presented, but the contrary, for both paragraphs disavow knowledge on the part of appellants of the fact.

For the error above indicated, the cause is reversed, with instructions to the trial court to overrule the demurrers of the Ohio Oil Company to each paragraph of the complaint.

On Petition to Recall Opinion.

The appellee, the Ohio Oil Company, has filed its petition asking that the opinion rendered in the cause be recalled, and that its petition for an oral argument filed while the cause was pending in the appellate court and addressed to that court not be ruled on, be granted, and that oral argument on the questions of law involved be heard. This petition has been given due consideration. The cause was ably and exhaustively briefed by the learned counsel for appellee. All of the briefs contemplated by law and the rules of this court were in March 12, 1909, and appellee's petition for oral argument was not filed until July 19, 1909, more than nine months after submission of the cause. Oral arguments should be requested by written application within the time allowed for

filing briefs; otherwise the court in its discretion will refuse the application. This is the provision of rule 26 (55 N. E. vi) of the rules of this court.

Petition to recall opinion and grant an oral argument is therefore overruled.

YOUNG v. HINDERLIDER.

[Supreme Court of New Mexico, August 30, 1910.]

15 N. M. 666, 110 Pac. 1045.

1. **Waters and Water Courses—Appropriation—Action of Territorial Engineer—Construction of Statute.**

Under the laws of 1907, c. 49, regarding the disposition of public waters, the territorial engineer is not, either by the express terms of the statute or by implication, restricted in rejecting an application to the ground that the project would be a menace to the public health or safety.

2. **Same—Object of Statute.**

The object of the statute is to secure the greatest possible benefit to the public from the public waters of the state.

3. **Same—Public Interest—Protection of Investors.**

It is of public interest to protect investors against worthless investments by official approval of unsound enterprises.

4. **Same—Approval of Irrigation Project.**

It is against public interest that an irrigation project receive official approval when the result would be the sale of land which could not be irrigated at the price of irrigated land.

5. **Same—Irrigation Project—Consideration of Cost in Determining Application.**

The mere fact of the cost of one irrigation project in excess of that of another is no ground for rejecting the first, but the cost should be taken into consideration in determining upon the granting or rejection of the application.

6. **Same—Other Matters Considered.**

In determining what is a reasonable charge for water for irrigation, the cost of construction and operation of the works, the productiveness of the land, and the other circumstances which show what the owners can afford to pay for water, must be taken into consideration.

7. **Same—Residence of Applicants Considered.**

The fact that one applicant is not a resident of the territory and that others are actual settlers, may be taken into consideration in determining the question of public interest, but should not outweigh all other considerations.

8. **Same—Granting Application in Part.**

That a subsequent application for approval of project for irrigation is better than a prior one, is no reason why the prior one should not be granted as to the land for which it is available or feasible.

Appeal from judgment of district court, affirming decision of Board of Water Commissioners reversing decision of territorial engineer, rejecting one application for permit to appropriate waters for irrigation project and granting a subsequent application. Reversed and remanded for further proceedings.

On the 1st day of October, 1907, M. C. Hinderlider filed with the territorial engineer an application for a permit to appropriate two

hundred second feet of the flow of the La Plata River in San Juan County, N. M., and for the construction of a storage reservoir with a storage capacity of 12,406 acre feet, for the purpose of reclaiming and irrigating about 14,000 acres of land in said county. On December 20, 1907, Messrs. Young & Norton for themselves and others filed with the territorial engineer an application for a permit to appropriate the waters of the same stream in the same county and territory, for the purpose of reclaiming and irrigating about 5,000 acres of land, being a part of the same land covered by the Hinderlider project. This last application included the construction of a storage reservoir with a storage capacity of 10,149 acre feet for the purpose of storing the flood waters of the said river and applying the same to the reclamation of the said 5,000 acres of land. After the publication of the notice required by law, and on the 19th day of March, 1908, the said Young, Norton, and others filed with the territorial engineer a protest against the approval of the said Hinderlider application. After a hearing before the territorial engineer, and on July 20, 1908, he rendered an opinion sustaining said protest, rejecting the Hinderlider application, and approving the application of the protestants; the said findings and order of the said territorial engineer, omitting the caption, being in words and figures as follows:

"The territorial engineer finds, from the evidence presented by oral testimony, at the hearing in the above matter, at Aztec, on the 10th day of April, 1908, from affidavits presented before and after said hearing, and from the official records:

"First. That M. C. Hinderlider on the 1st day of October, 1907, filed with the territorial engineer an application for a permit to appropriate an amount equal to two hundred second feet of continuous flow during irrigation season, of public water from the La Plata River, for the purpose of irrigating 14,000 acres.

"Second. That the survey necessary before making said application was made prior to the opening of the land for settlement, and that the application was asked for the purpose of appropriating said water by the forming of a company, the building of necessary construction works, and

CASE NOTE.

Jurisdiction of Water Commissioners and Officers of Similar Character.

the sale of water rights at a cost of forty dollars per acre on land under said project, and that a large portion of said land is under the control of protestants who have entered or settled on the land.

"Third. That on March 19, 1908, Young, Norton, and twenty-two others filed protests against the granting of said application of M. C. Hinderlider, and also against the granting of an application by Jay Turley and others.

"Fourth. That the protestants, Young & Norton and others, filed application for a permit to appropriate public waters from the same stream on the 20th day of December, 1907, with the intention of irrigating 5,000 acres.

"Fifth. That Young & Norton et al. are actual settlers or entry men on about 5,500 acres under the project, and that the above parties immediately after October 3, 1907, when the said lands were opened to entry by the United States government, employed surveyors to make surveys preparatory to making an application for a permit to appropriate, and that they used reasonable diligence in collecting data in the shape of maps and surveys, for the filing of said application at an early date.

"Sixth. That the application of Young & Norton was not asked for speculative purposes, but with the intent of irrigating and developing the lands now settled or entered upon by said settlers.

"Seventh. That the cost of their work can be built by Young & Norton et al. for less than twenty dollars an acre.

"Eighth. That on the 25th day of October, 1907, Jay Turley and H. L. Hollister filed an application for a permit to appropriate water from said La Plata River to irrigate the lands owned by Young & Norton et al., and the engineer ordered of them a statement of their intended prices per water right for land under control by protestants, but statement of said prices was not filed in the office of the territorial engineer, but that he was informed verbally that they would ask thirty-five dollars an acre for water right upon said land.

"Ninth. That the extent of the unappropriated flood waters available is not sufficient to irrigate more than 5,000 or 6,000 acres.

I. Object and Constitutionality of Statute.

It is policy of the law to regulate the diversion and use of the waters flowing in the streams of the state for the irrigation of lands by an uniform system applying to all waters thus diverted, and the law of appropriation as

"Therefore, the engineer is of the opinion:

"First. That there is unappropriated water available for approximately 5,000 or 6,000 acres.

"Second. That either the applicant or protestants, if their applications were approved, could and would complete their appropriation satisfactorily to the territory.

"Third. That the Young & Norton et al. project is more within the available water supply, making the same more feasible.

"Fourth. That it would not be to the best interests of the public to approve the application of M. C. Hinderlider, thereby forcing the protestants to pay more than double price for their water rights. The same conditions as to the public interest would also apply to the application of Jay Turley et al., in so far as the amount of water allowed in the approval of Young & Norton et al. application might be affected.

"It is therefore ordered that the application of Young & Norton be approved, as follows:

"APPROVAL OF TERRITORIAL ENGINEER.

"The number of this permit is 107.

"Date of receipt of first application, December 20, 1907.

"Publication of notice completed and proof filed March 23, 1908.

"Application recorded in Book A, page 107.

"Approved this 20th day of July, 1908.

"This is to certify that I have examined the within application for a permit to appropriate the public waters of the territory of New Mexico, and hereby approve the same.

"The amount of water appropriated:

"(a) By diversion.....cubic feet per second.

"(b) By storage 20,290 acre feet.

"(c) Remarks: This application is limited to an annual appropriation of 20,290 acre feet and shall not be exercised at such times that the same would be of detriment of prior valid rights to the use of water from said stream.

defined by the statute and administered by the state board of irrigation, is deemed an effective means to accomplish the desired results. McCook Irrigation & Water Power Co. v. Crews, 70 Neb. 115, 102 N. W. 249 (1905).

The rejection of an application for a permit for an irrigation project is not restricted to the ground that the same would be a menace to public health or safety, but action should be based upon the best public good and interest. Young v. Hinderlider, principal case.

The statute governing the appropriation of water flowing in the streams of the state for the purposes of irrigation is constitutional. McCook Irrigation & Water Power Co. v. Crews, 70 Neb. 115, 102 N. W. 249 (1905).

"The construction of the within described works to be commenced not later than January 1, 1909.

"One-fifth of the work above specified to be completed on or before July 20, 1909.

"The whole of said work to be completed on or before July 20, 1910.

"The time for application to beneficial use shall not be later than October 1, 1911.

"Witness my hand this 20th day of July, A. D., 1908.

"[Signed] VERNON L. SULLIVAN,
"Territorial Engineer.

"In the event of the failure of Young & Norton et al. to complete their appropriation according to the above approval, the application of M. C. Hinderlider and Turley and others will be considered in routine of their priority of filing.

"Santa Fe, New Mexico, July 20, 1908."

Thereupon the said Hinderlider appealed from the decision of the said territorial engineer to the board of water commissioners of this territory, which board, after hearing all of the evidence offered by the parties and the argument of counsel, reversed the decision of the said engineer, and directed him to approve the application of the said Hinderlider; the findings and order of said board being in words and figures as follows, to wit:

"STATEMENT.

"It appears from the records in the office of the territorial engineer and from the applications, maps, plats, field notes, and affidavits and other papers filed in the office of the territorial engineer and with the board, and from the testimony presented to the board at the several hearings: That on the 1st day of October, 1907, M. C. Hinderlider filed with the territorial engineer an application for a permit to appropriate water from the La Plata River in San Juan County, N. M., to an amount equal to two hundred second feet continuous flow during the irrigation

II. Not Judicial Officers.

Water commissioners and engineers have no power to act in a judicial capacity. Boulder & Left Hand Ditch Co. v. Hoover, 48 Colo. 343, 110 Pac. 75.

III. Over What Waters.

A. Private and Appropriated Waters.

Jurisdiction of territorial engineer does not extend to waters held in private ownership or by prior appropriation but only to the public unappropriated waters. Vanderwork v. Hewes, *post*, p. 351.

B. Seepage and Percolating Waters.

No application to engineer is necessary to appropriation of seepage or spring water on appropriator's own lands. Vanderwork v. Hewes, *post*, p. 351.

season, for the purpose of irrigating 14,000 acres of land and for the construction of a storage reservoir with a capacity of 12,406 acre feet at one filling, and the ditches and reservoirs necessary to carry out said project. That after publication of notice a protest was filed by appellees Young & Norton et al., on March 19, 1908, and after a hearing on April 10, 1908, the territorial engineer sustained the protest and rejected the application of M. C. Hinderlider, at the same time approving the application for practically the same water, filed by John D. Young and Geo. N. Norton, two of the protestants, which application was filed in the office of the territorial engineer on December 20, 1907, and contemplated irrigating about 5,000 acres of land. From this decision M. C. Hinderlider appealed to the board. The reasons alleged by the protestants for the rejection of Mr. Hinderlider's application were: That the protestants were actual settlers or entry men on some of the land proposed to be watered; that the application of Mr. Hinderlider was not based upon actual surveys, measurements, and field notes made by him, but upon surveys made by the United States Reclamation Service at the expense of the United States, and which he was not entitled to use for his personal benefit; and that the project contemplated by the application of Hinderlider was considerably more expensive than that contemplated by the application of Messrs. Young & Norton, and the rejection of the Hinderlider application and the approval of that of Young & Norton might enable the owners of the land in that neighborhood to obtain water rights at less cost. In rejecting the application of Hinderlider and approving that of Young & Norton, the territorial engineer gives as his chief reason for his decision that the project of Young & Norton is more within the available water supply, and therefore a more feasible project, and that it would not be to the best interests of the public to approve the application of Hinderlider, thereby forcing the protestants to pay a larger price for their water rights than they have to pay under the project of Young & Norton.

"At the hearing before the board, at Farmington, in San Juan County, and the subsequent hearing in Santa Fe, it was shown to the satisfaction

Jurisdiction of territorial engineer does not extend to seepage, percolating or spring waters on private lands. Vanderwork v. Hewes, *supra*.

Jurisdiction of territorial engineer over seepage waters extends only to seepage waters from constructed reservoirs, ditches, etc. Vanderwork v. Hewes, *supra*.

IV. Applications to.

A. Necessity for.

A water master has no legal authority to begin his work as water master until he has been called upon by two or more owners or managers of ditches or persons controlling ditches in his district, by application in writing, stating that there is a necessity for the use of water. Until

of the board that the survey from which the maps, plats, and field notes filed by Hinderlider were made was an actual survey made under his direction, and at his expense, by an engineer and assistants employed by him. It appears that the engineer employed by Hinderlider did retrace a ditch line previously surveyed by the United States Reclamation Service, using the government stakes whenever convenient, or wherever they were in place; but the testimony of the engineer and his assistants and the original field book kept by him, in which the notes of his surveys were recorded, showed conclusively that he did make an actual survey, and that the plats, maps, and field notes filed by Hinderlider were taken from these notes. It was shown by the evidence that Hinderlider, and also the engineer employed by him to make this survey, had been in the employ of the United States Reclamation Service in making surveys in that neighborhood for an irrigation project which had been abandoned by the government, and the knowledge so obtained and the stakes of the abandoned government ditch line were undoubtedly of great assistance to them in making the subsequent survey; but it appears that they did not use the field notes of the government survey in any manner in preparing the application, maps, plats, and field notes filed with the territorial engineer. The engineer in his decision based his action on the ground that the project of Young & Norton would be for the best interest of the public because it would enable people living in that vicinity and under the proposed ditch to purchase water at a less price than they might have to pay were the application of Hinderlider approved.

"DECISION.

"The board is of the opinion that the statute (§ 28, c. 49, Laws 1907) contemplates that the territorial engineer may reject an application if he finds that the project would be contrary to the public interest, in that it would be a menace to the public health or safety, and not for the reason that a project described in an application subsequently filed might be more advantageous to the owners of private property in the neighborhood; and that it was not the intention of the legislature to vest

that is done the water master has no authority whatever to begin work as such water master. Walker v. Elmore County, 16 Idaho 696, 102 Pac. 389 (1909).

B. Effect of.

An application to the state engineer for permission to appropriate public water has only the effect of notice of an intent to appropriate. It is not an appropriation, which can never be complete until the water is actually diverted and put to a beneficial use. Sowards v. Meagher (Utah), 108 Pac. 112 (1910).

C. Granting in Part.

Application may be granted in part for the land for which the project is

in the territorial engineer or the board such discretionary powers as to authorize him or them to discriminate against a prior application in favor of one filed later, because one project would be less expensive than another to water users. The same principle should govern with respect to applications to appropriate water under the New Mexico statute as in the applications for entries of lands under the public land laws of the United States; the first applicant making a filing in compliance with the law should be recognized, and, if he shall subsequently comply with the regulations and statutes, his application should be approved, unless the project is, in the opinion of the engineer, a menace to the public health or safety, or unless there is no water available under the application.

"In the present case the testimony shows that there is unappropriated flood water available, and that while it is claimed that the project of Young & Norton might be more advantageous to the protestants, nevertheless, the project described in the prior application is feasible, and its approval would not be contrary to the public interest. The board believes that the interest of the owners of the land under the proposed ditches and reservoir who may desire to become water users under the project are amply protected by the provisions of law which require owners of such works to supply water at reasonable rates.

"If the board could take into consideration the question of benefits to the public from the construction of the respective projects, it would be manifestly more to the benefit of the public, being the people of the Territory of New Mexico, or the people of San Juan County, N. M., to have the larger project constructed which would furnish water to irrigate 14,000 acres, than a smaller one to cover only about 5,000 acres; and it would be exceedingly detrimental to the interests of all the people of the territory if a bona fide application by one who had complied with all the requirements of the statute and the rules and regulations established by the territorial engineer were to be rejected upon such grounds in favor of an application subsequently filed. It is certainly to the interest of the territory that outside capital be invited and encouraged to construct irrigation works in the territory, and that the law relating to

available or feasible. Young v. Hinderlider, principal case.

V. Powers and Duties.

A. To Enforce Decrees.

The primary duty of water commissioners and engineers is to enforce decrees fixing the rights of consumers. Boulder & Left Hand Ditch Co. v. Hoover, 48 Colo. 343, 110 Pac. 75.

B. To Prevent Waste, etc.

Water commissioners and engineers may prevent waste, and insist upon economical use. Boulder & Left Hand Ditch Co. v. Hoover, 48 Colo. 343, 110 Pac. 75.

Under the Colorado statute the water commissioner is not required nor is it his duty to make any division or distribution of the water between the users thereof

water rights be consistently enforced so as to protect those who in good faith initiate such enterprises.

"For the foregoing reasons the decision of the territorial engineer in rejecting the application of M. C. Hinderlider, and in approving the subsequent application of Young & Norton, in so far as the same includes any rights covered by the prior application, is hereby reversed, and the territorial engineer is directed to approve the said application of M. C. Hinderlider.

"[Signed] CHARLES SPRINGER,
"President Board of Water Commissioners."

The protestants, Young, Norton, and others, appealed from the decision of the water commissioners to the district court of San Juan County, in which the cause was heard November 17, 1909, on an agreed statement of facts, which is in words and figures as follows:

"(1) On the 1st day of October, 1907, M. C. Hinderlider filed with the territorial engineer an application for a permit to appropriate two hundred second feet of the flow of the La Plata River, in San Juan County, N. M., and for the construction of a storage reservoir with a storage capacity of 12,406 acre feet, all for the purpose of reclaiming and irrigating about 14,000 acres of land in said county and territory.

"(2) On December 20, 1907, these protestants filed with the territorial engineer an application for a permit to appropriate the waters of the same stream in the same county and territory for the purpose of reclaiming and irrigating about 5,000 acres of land, being a part of the same lands covered by the Hinderlider project. The said application included the construction of a storage reservoir with a storage capacity of 10,149.3 acre feet, for the purpose of holding and storing the flood waters of said La Plata River and applying same to the reclamation of said 5,000 acres of land.

"(3) That on March 19, 1908, these protestants filed with the territorial engineer a protest against the approval of the said Hinderlider

from the same ditch, neither has he any authority to interfere with the internal management of the affairs of a ditch company, but it is his duty to turn into a ditch no more water, to which it may be entitled to by virtue of a decree, than is necessary to serve the needs of the consumer under such ditch, and to refuse to turn water into any ditch for the use of one not entitled thereto. Cache La Poudre Irrigation Ditch Co. v. Hawley, 43 Colo. 32, 95 Pac. 317 (1908).

C. Cannot Affect Prior Appropriator.

State engineer has no power to grant right to use water from stream the entire amount of which has been appropriated prior thereto. Lockwood v. Free-

application, alleging among other things that the protestants are all actual settlers or entry men upon the land proposed to be watered, aggregating 5,000 acres; that protestants believe that they can conduct water to their land at an approximate expense of eleven dollars an acre, and that protestants are financially able to immediately proceed with the construction of the proposed ditch and reservoir; that if their application be allowed they will at once proceed with the construction of the said ditch and reservoir and will have their lands under water for the season of 1909; that they could not positively state what the water would cost per acre for their use on their lands, if they must purchase it from Mr. Hinderlider, but that they were credibly informed and believe that the cost of the same would be from thirty to forty dollars per acre; that the application of the said Hinderlider was made for speculative purposes and for the personal benefit of the applicant, while the application of protestants was made for the benefit of actual settlers upon the land.

"(4) That after a hearing the territorial engineer on July 20, 1908, rendered an opinion sustaining said protest, rejecting the Hinderlider application, and approving the application of protestants, findings as per copy of said decision herein filed.

"(5) That thereupon the said M. C. Hinderlider appealed from the decision of said territorial engineer to the board of water commissioners of this territory, which board, after hearing the evidence and argument of counsel, reversed the decision of the said engineer, findings as per copy of their decision herein filed.

"(6) That the said M. C. Hinderlider is financially able to immediately proceed with the construction of the said ditch and reservoir.

"(7) From said decision of said board these protestants have taken this appeal to this court."

That court sustained and affirmed the decision of the board of water commissioners, to which action Young, Norton, and others excepted and brought the matter to this court on appeal.

For appellants—Martin & Edwards.

For appellee—E. C. Abbott and H. C. Allen.

man, 15 Idaho 395, 98 Pac. 295 (1908).

License by state engineer cannot have the effect of depriving a prior appropriator of water to which he is entitled. Lockwood v. Freeman, 15 Idaho 395, 98 Pac. 295 (1908).

D. Not to Litigate Disputes.

Water commissioners and engineers have no power to litigate disputes between claimants under decrees fixing their respective rights. Boulder & Left Hand Ditch Co. v. Hoover, 48 Colo. 343, 110 Pac. 75.

E. Not to Impeach Decrees.

It is neither the duty nor privilege of water commissioners, division engineers, or the state engineer, to question decrees fixing water rights, where regular in

ABBOTT, J. (after stating the facts). We think the decision of the district court was justified and probably required by the statement of facts on which it was heard; but we find that statement very incomplete and unsatisfactory as the basis of a decision in such a cause. If it were a matter of private interest alone, a question simply between two rival applicants for the right to use the waters in question, we should content ourselves with affirming the decision of the district court. But the question is much broader than that, and includes the public interest as well, by the terms of the statute under which the territorial engineer, the water commissioners, and the courts have jurisdiction of the subject-matter.

The view apparently adopted by the water commissioners in their decision that the power of the territorial engineer to reject an application, "if in his opinion the approval thereof would be contrary to the public interest" (section 28), is limited to cases in which the project would be a menace to the public health or safety is, we think, not broad enough. There is no such limitation expressed in terms in the statute, and we think not by implication. The declaration in the first section of the statute that the waters therein described are "public waters," and the fact that the entire statute is designed to secure the greatest possible benefit from them for the public, should be borne in mind. It is, for instance, obviously for the public interest that investors should be protected against making worthless investments in New Mexico, and especially that they should not be led to make them through official approval of unsound enterprises. If there is available unappropriated water of the La Plata River for only 5,000 or 6,000 acres of land, it would be contrary to the public interest that a project for irrigating 14,000 acres with that water should receive an official approval which would, perhaps, enable the promoters of it to market their scheme, to sell stock reasonably sure to become worthless, and land which could not be irrigated at the price of irrigated land. Such a proceeding would in the end result only in warning capital away from the territory. The failure of any irrigation project carries with it not only disastrous consequences to its owners and to the farmers who

form and in force and effect, or to attempt to impeach or nullify them, or in any way impair their efficiency. Boulder & Left Hand Ditch Co. v. Hoover, 48 Colo. 343, 110 Pac. 75.

F. Not to Change the Use.

Water commissioners and engineers have no power to decide upon the right to change the place of use of water. Boulder & Left Hand Ditch Co. v. Hoover, 48 Colo. 343, 110 Pac. 75.

G. To Extend Time.

Under the Utah statute the state engineer has large discretionary power and may extend the time for completion of appropriation beyond that first fixed by him, if within the statutory time, although the application was not made

are depending on it, but besides tends to destroy faith in irrigation enterprises generally.

It may be said that the territorial engineer could have approved the Hinderlider project for the number of acres which could be irrigated from it. He makes it clear, however, from his report, that the cost of the works for that project would be much greater than for works fit to irrigate the land which could really be irrigated from the available water there. While that element is not conclusive on the question of public interest, we think it should be taken into account. It may be that, of the 5,000 or 6,000 acres there which it is claimed can be irrigated at an expense of ten or twelve dollars per acre under the Young-Norton project, a thousand acres could be irrigated at five dollars per acre because of its being at a lower level or nearer the water than the other land. But that would not justify refusing the owners of the other 4,000 or 5,000 acres the privilege of irrigating their lands, under a plan which would increase the cost of irrigation to the owners of the thousand acres. And the same may be said of the Hinderlider project as compared with the Young-Norton project. The mere fact that irrigation under the former project would cost more per acre than under the latter is not conclusive that the former project should be rejected. But the attempt to cover too much land may have gone so far that the cost of irrigation under that project would be so excessive that the owners of land under the project could not pay the water rates and farm their lands at a profit. The statute provides that the charges for irrigation shall be "reasonable;" but what is reasonable in any case must depend largely on the cost of constructing and operating the irrigation works.

The agreed statement of facts on which the judgment of the district court is based may be held to include by reference the findings of the territorial engineer and those of the board of water commissioners, although it is not made clear that they are to be a part of the stipulated facts, as it should be if that was the intention of the parties. Even if they are to be considered, we are still without proper material for a conclusion. The territorial engineer finds that the Young-Norton project is "better within the available water supply." But that furnished no

until after the time first fixed expired. Pool v. Utah County Light & Power Co., 36 Utah 508, 105 Pac. 289 (1909).

VI. Officers de Facto.

Where the right to office was not questioned, and one acting as collector of an irrigation district sold the property under an assessment, the sale will not be held invalid because such officer was not eligible to the office on account of residence, his acts being good as an officer *de facto* although he may not have been an officer *de jure*. Baxter v. Dickinson, 136 Cal. 185, 68 Pac. 601 (1902).

As to irrigation districts in general and the powers and duties of officers thereof, see note to Pioneer Irrigation Dist. v. Oregon Short Line, *ante*, pp. 5, 53.

reason why he should not have approved the earlier project for the amount of land there is water for. He does not find that the cost of water under the Hinderlider project would be prohibitory or excessive, but only that it would be considerably greater per acre than under the Young-Norton project. The price which the owners of land can afford to pay for irrigation must depend in part on the use to which it can be put.

For ordinary farm crops forty dollars per acre for water might be prohibitory, while for fruit or garden truck in certain localities it might not be excessive. But neither the territorial engineer nor the water commissioners have touched on that point in their reports. The territorial engineer apparently bases his approval of the latter project as against the former on the fact that Young and Norton and their associates are actual settlers on the land, while Hinderlider is not a resident of the territory. We do not say this circumstance should have no weight in determining the question of the public interest, but we think it should not outweigh the other considerations to which we have referred.

On the other hand, the water commissioners find that there is available unappropriated flood water of the La Plata River, but do not find whether there is enough for 14,000 or any other number of acres, nor whether the cost of the Hinderlider project would be such as necessarily to make the irrigation charges under it prohibitory or excessive.

We find in Armijo v. County Commissioners, 11 N. M. 294, 67 Pac. 730, a precedent for the course which we think it advisable to pursue in this matter.

The cause is therefore remanded to the district court to obtain facts through the water commissioners and territorial engineer, or by agreement of counsel, or otherwise, essential to a satisfactory decision of the cause. It is not meant to limit the district court to the precise points we have named, but to leave the matter open for the introduction of any facts bearing on the question of public interest. And the judgment of the district court is set aside in order that it may on further consideration render such decision as it shall deem proper.

POPE, C. J., and PARKER, MECHEM, and WRIGHT, JJ., concur. McFIE, J., having heard this cause in the district court, did not participate in this decision.

As to the powers and duties of commissioners and other officers of drainage districts, see note to Seibert v. Lovell, *ante*, p. 261.

As to obligation to return surplus water after use, see note to Windsor Reservoir and Canal Co. v. Hoffman Ditch Co., p. ——, vol. 2, this series.

As to appropriation of waters of spring, see I, C, note to Hollett v. Davis, *post*, p. 419.

VANDERWORK (Territory of New Mexico, Intervenor) v. HEWES et al.

[Supreme Court of New Mexico, August 9, 1910.]

15 N. M. 439, 110 Pac. 567.

1. **Waters and Water Courses—Public and Private Waters—Jurisdiction of Territorial Engineer.**

The laws of 1907, providing that the territorial engineer shall have supervision of the apportionment of waters, etc., do not relate to waters held in private ownership or by prior appropriation, but only to public and unappropriated waters within the territory.

2. **Same—Percolating and Seepage Waters Are Not Public.**

Section 1 of Act of 1907, providing that all natural waters flowing in streams and water courses, whether such be perennial or torrential, within the limits of the Territory of New Mexico, belong to the public and are subject to appropriation for beneficial use, does not apply to seepage or percolating waters or spring waters appearing upon private lands from unknown causes.

3. **Same—Jurisdiction of Territorial Engineer Over.**

The territorial engineer's jurisdiction, with the exception of seepage water referred to in section 53, is limited to such public waters as are embraced in section 1.

4. **Same—Seepage Waters—Application of Term.**

The term seepage waters, as used in section 53 of the Act of 1907, applies only to constructed reservoirs, ditches, etc.

5. **Same—Seepage or Spring Water on Private Lands—Not Public Waters.**

Section 53 of Act of 1907 has no application to seepage or spring water arising upon private lands from an unknown source.

6. **Same—Not Subject to Appropriation—But Surplus Is.**

Seepage or spring water, appearing upon land of private proprietor, is not subject to appropriation and distribution under the Laws of 1907, but any surplus remaining after the reasonable necessities of the proprietor of the land upon which the spring is situated and those of an adjoining owner to whom he has granted the right to use the waters, may be appropriated under the general law of appropriation of waters.

7. **Same—Owner of Land May Use without Application to Territorial Engineer.**

Where seepage or spring water appears upon the land of a private proprietor, he has the right to the use thereof, and it is not required that he apply to the territorial engineer for permission to appropriate the same.

Plaintiff applied to territorial engineer for right to appropriate certain waters, to which defendants protested. Application granted and action

As to appropriation of waters of spring, see I, C, note to Hollett v. Davis, *post*, p. 419.

As to jurisdiction of water commissioners and officers of similar character, see note to Young v. Hinderlider, *ante*, p. 339.

of territorial engineer reversed upon appeal to board of water commissioners, and protest sustained, from which appeal taken to district court and action of commissioners sustained. Appeal from such judgment. Affirmed.

From the opinion of Hon. William H. Pope, the presiding judge who tried the case in the court below, we adopt the following statement of facts, disclosed by the record, and upon which a reversal is sought in this court: "That some time in the latter part of the year 1906 there appeared upon the surface of the land of J. M. Hewes, one of the contestants, seepage water or spring water, from some unknown source, at a place where there had been no seepage or spring water for at least five years previous. That the flow increased during the winter of 1906-07, diminished during the summer of 1907, and again increased during the fall of 1907 to such an extent that it spread over the road and onto adjoining land of E. O. Dean, contestant herein, and that by reason of an embankment constructed on the land of said E. O. Dean across a draw or swale the water backed over the public road. The road overseer of that district requested permission of Dean to cut the embankment and allow the water to flow down upon the land of Dean and relieve the public road. To this Dean consented, provided that he be allowed to make use of the water for irrigating his lands, and to construct a ditch to convey the water to his farm lands for that purpose. About the same time, or subsequently thereto, Dean secured permission from said Hewes to so use the water and did construct a ditch for that purpose. The court further finds that on February 6, 1908, Fred Vanderwork, applicant named above, filed an application in the office of the territorial engineer for a permit to appropriate the water, claiming it to be subject to appropriation under chapter 49, Laws 1907, the plan of Vanderwork, as shown by his plats and field notes, being to construct a deep ditch through the land of Hewes so as to carry off the water and convey it by ditch a distance of about one mile, in order to use the same for irrigating lands belonging to Vanderwork. After publication of notice, protest was filed by said Hewes and Dean. Upon a hearing on the protest by the territorial engineer, he dismissed the protest and approved the application of Vanderwork. From this decision Hewes and Dean appealed. By agreement of counsel the appeal was submitted to the board of water commissioners upon briefs and the affidavits and records in the office of the territorial engineer, and the board of water commissioners, after hearing and considering same, reversed the findings and holdings of the territorial engineer, and found that the water in controversy was not subject to appropriation by Vanderwork, whereupon Vanderwork has appealed said controversy to this court."

For appellant—Reid & Hervey.

For appellees—Grantham & Dye.

McFIE, J. (after stating the facts). The main question for our consideration is whether or not the water involved in this controversy is public water, subject to distribution by the territorial engineer under chapter 49, Laws 1907. It is clear that the application of Vanderwork for the appropriation of the water was made under that law and the permission granted by the engineer for the use of the water upon the lands of Vanderwork necessarily assumes that the water which arises upon Hewes' land is subject to distribution under the provisions of Act of 1907. Section 12, c. 29, Laws 1907, provides as follows: "The territorial engineer shall have the supervision of the apportionment of the water in this territory, according to the licenses issued by him and his predecessors and the adjudications of the courts." This section, however, cannot be held to relate to waters held in private ownership or by prior appropriation, but must be held to relate to public and unappropriated waters within the territory. Section 1 of the Act of 1907 makes this clear, as it provides that "all natural waters flowing in streams and water courses, whether such be perennial or torrential, within the limits of the territory of New Mexico, belong to the public, and are subject to appropriation for beneficial use." This section expressly limits the operation of the Act of 1907 to natural public waters within the territory of New Mexico, with the further limitation that it is water flowing in streams and water courses. This section necessarily indicates the character of the waters to which the engineer's jurisdiction attaches for purposes of distribution, as provided for in the act, with the single exception of the seepage water referred to in section 53 of that Act. The legislature therefore did not confer upon the territorial engineer jurisdiction for the distribution of all the waters within the territory, but only over such public waters as are embraced in section 1, and the seepage waters referred to in section 53, subject to the conditions therein expressed.

The case at bar seems to furnish an excellent illustration of the correctness of the above construction. In the first place, it is admitted that the water involved in this case does not come from a stream or water course, as defined in section 1 of the Act of 1907, but, on the contrary, its source is unknown. Such being the case, it is not contended by appellant that this water comes from either a stream or water course. That it is seepage or percolating water seems to be accepted by all parties. In fact, appellant's application for permit states that it is seepage water and not tributary to any stream. Clearly, then, the territorial engineer

had no authority to grant Vanderwork a permit to take this water under section 1 of the Act of 1907, but his authority to act must be found in section 53, if such authority existed. Section 53 is as follows: "In the case of the seepage water from any constructed works the owner of such works shall have had the first right to the use thereof upon filing an application with the territorial engineer, as in the case of an original appropriation, but if such owner shall not file said application within one year after the completion of such works, or the appearance upon the surface of such seepage water, any party desiring to use the same shall make an application to the territorial engineer, as in the case of unappropriated water, and such party shall pay to the owner of such works reasonable charge for the storage or carriage of such water in such works: Provided, that the appearance of such seepage water can be traced beyond a reasonable doubt to the storage or carriage of water in such works." Under the above section the only seepage water over which the engineer has power to grant permits for appropriation by applicants is seepage water from "constructed works." The term "constructed works" is used in many of the sections of the Act of 1907, and, as was held by the board of water commissioners, in its opinion overruling the territorial engineer, refers to constructed reservoirs and ditches. There being no proof of any such constructed works, or proof that the seepage water came from such works, the engineer was without authority under that section to grant permits for its appropriation by the appellant; and this is true regardless of whether the owner of the land upon which the water appeared applied for its appropriation or not. It is true that one witness was of the opinion that the water came from a dynamited artesian well three-fourths of a mile away. This, of course, was only a speculative opinion of the witness. Even if true, it would be immaterial, as this well would not be constructed works within the act. These sections are the only sections in the Act of 1907 conferring authority upon the territorial engineer to grant permits or licenses for the appropriation of water, and as the waters for the use of which the engineer granted the appellant a permit were not of the character embraced in either section 1 or 53, but were seepage or percolating waters from an unknown source, the lower court correctly held that the territorial engineer had no jurisdiction over such waters and no power to grant appellant a permit to appropriate them.

Counsel for appellant further contends that, although appellant's permit for the appropriation of the water on Hewes' land may not be upheld, he has a superior right by virtue of his attempted appropriation as against Dean, and even Hewes, the owner of the land upon which the water appears upon the surface, except as to so much as may be applied to a bene-

ficial use by Hewes upon his own land. Counsel, in his able brief, presents a line of authorities supporting the doctrine of "a reasonable use" rather than ownership of seepage or percolating waters upon lands in private ownership, and in a proper case these cases would have great force, but in our opinion the present case does not come within the doctrine laid down in Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35, a leading case upon this subject. This case and many others involve the disposition of percolating water from large areas of land saturated with artesian water, and the same rules of law pertaining to surface and subterranean streams is held to be applicable to such water, notwithstanding such water is not in a channel with well-defined bed and banks, the accepted definition of streams and water courses. The case at bar is entirely different, in this, that a small quantity of water percolates to the surface and forms a small basin wholly upon the lands of Hewes, and coming from a source unknown, so far as the record discloses. While this water sometimes recedes to the point of disappearance and returns again to the surface, it spreads over a part of Hewes' land at times and upon a portion of the lands of Dean, an adjoining owner. It must be conceded that for many years the law as to such waters has been that the water was a part of the land, and that each landowner could do with it as he chose. Southern Pacific R. Co. v. Dufour, 95 Cal. 615, 30 Pac. 783, 19 L. R. A. 92.

The case of Metcalfe v. Nelson, 8 S. D. 87, 65 N. W. 911, 59 Am. St. Rep. 746, we regard as directly in point under the facts in this case. The court in that case says: "As the hidden water in the plaintiff's soil belonged to him as a part of it, he might, by artificial means, separate it from the soil, and it would still belong to him. He might sink a well, into which such water would work its way, and the accumulation in the well would still be his, and subject to his proprietary control. Davis v. Spaulding, 157 Mass. 431, 32 N. E. 650, 19 L. R. A. 102. If the water which fills this spring is not subject to the law of running streams, but to that of percolating water, did the plaintiff lose his ownership of it when it appeared upon the surface? If a cloud had burst on plaintiff's land, and filled a cavity thereon with rain, it would, while so confined, belong to plaintiff, and we are unable to see why or how the question of ownership can be made to depend upon which way the water comes from. Suppose this percolating water appeared at the surface only at the point of the spring, and at once sunk away again into the surrounding soil, resuming its character of wandering, seeping water, would the plaintiff's proprietary rights come and go with the appearance and disappearance of the water? It must be remembered that we are not dealing with a running stream, or with riparian rights, but simply with percolating waters

which have combined and struggled to the surface on plaintiff's land. We think the plaintiff had more than the ordinary usufruct in the water of this spring, so long, at least, as it was held in the spring. He might consume or dispose of it all if he chose. He might convey it away in pipes, or carry it off in tanks. If medicinal, he might bottle it, and sell it for the healing of the nations. It would be inconsistent with the maintenance of such right in plaintiff to allow that the defendant or any other stranger had also the right, in hostility to the plaintiff, to take and carry away water from the same spring. While it may not be technically correct to say that the landowner is the absolute owner of percolating waters gathered into a spring or well, such is often the expression of the courts and text-writers, and probably means what in respect to water is practically equivalent to ownership—the exclusive right to use and dispose of it. While the precise question presented by this case appears to be novel, there are many cases which recognize the right of the owner of land upon which a spring so appears to sell and dispose of the right to all or a portion of the water it supplies."

The court below affirmed the decision of the board of water commissioners, overruling the territorial engineer in granting Vanderwork a permit to appropriate this water, and in doing so the court said: "In the opinion of the court, this water on the land of Hewes and Dean is not subject to appropriation by any one without their consent, so as to deprive them of the use thereof on their land. The court is further of the opinion that Hewes and Dean did not have to apply to the territorial engineer for a permit to appropriate this water, and that the applying of this water to their lands was an appropriation thereof." This we believe to be a correct statement of the rights of the parties under the law, as it is immaterial whether Hewes was the absolute owner of the water on his land or had the exclusive right to appropriate it and apply it to a beneficial use upon his lands. Hewes' testimony is to the effect that he was applying the water to a part of his lands, and was preparing to use it upon one hundred acres of his land. He certainly has the right to do this if he can. The court below found that the water percolating to the surface on Hewes' land "does not flow in a defined channel or stream, but spreads over the soil, following the swales on the surface of the land of Hewes and Dean."

The appellant, under his permit from the territorial engineer, claims all of the water which reaches the lands of Dean in this way, notwithstanding Dean, with the consent of Hewes, has constructed a ditch or ditches to receive and conduct any surplus water which may reach his land, and claims the right to its use upon fifty acres of his land, and he has undoubtedly the better right to it as a prior appropriator as between

himself and Vanderwork. It would be doing violence to the Act of 1907 to hold that the territorial engineer was empowered by it to authorize another applicant to go upon lands held in private ownership, construct ditches and appropriate seepage water or waters from snows, rain, or springs not treaceable to or forming a stream or water course, or from constructed works, as the limitations contained in sections 1 and 53, defining the waters over which the engineer has been given jurisdiction, plainly indicate. In our opinion, therefore, if any surplus water exists after Hewes has appropriated to a beneficial use all he desires, and is permitted to enter the lands of Dean, he has a perfect right to appropriate it also to a beneficial use; but the rights of Dean are subject to the prior right of Hewes to apply all of the water to a beneficial use on his lands. As to the water in controversy in this case, any surplus which may in future exist beyond the necessities of Hewes and Dean would not be subject to appropriation and distribution under chapter 49, Laws 1907, but, if subject to appropriation at all without the consent of Hewes and Dean, it would be governed by the general law of prior appropriation which is applicable to the arid lands of the west. This water not being seepage water from constructed works, and therefore not subject to distribution under the Act of 1907, it was not necessary for Hewes to make application within a year to the territorial engineer for the appropriation of it, and his failure to make application, as provided in section 53, did not warrant an application for the appropriation of it by the appellant.

The decision of the lower court is affirmed, with costs; and it is so ordered.

PARKER, ABBOTT and MECHEM, JJ., concur. POPE, C. J., having tried the case below, did not participate in this decision, nor did Associate Justice WRIGHT, who did not hear the argument of this case.

ROSS v. BOARD OF SUPERVISORS OF WRIGHT COUNTY.

[Supreme Court of Iowa, July 13, 1905.]

128 Iowa 427, 104 N. W. 506, 1 L. R. A. (N. S.) 431.

1. Void Statutes—Proceedings Under, after Amendment.

Proceedings taken under a void statute which by a subsequent amendment is made valid, may also be validated by the amendment.

2. Constitutional Law—Due Process of Law—Notice in Drainage Proceedings.

A drainage statute which provides for notice to the property owner at some stage of the proceedings before an assessment is made, is not open to constitutional objection simply because it does not provide for a new or additional notice of each successive step leading up to the assessment.

3. Same—Addition of Lands to Drainage District—Notice Required.

The act providing for adding lands "in the vicinity" to a drainage district without provision for notice to the owners thereof is void as a taking of the property added without due process of law, and void as to others to whom notice is given where the taking of the lands "in the vicinity" is such an essential feature of the scheme or plan sought to be effected that its elimination would lead to results not contemplated by the legislature.

4. Same—Statute Void in Part.

Where part of a statute is void, and so connected with the general scheme or object sought to be attained by the legislature that the same would not be attained with the void portion stricken out, the whole statute is void.

CASE NOTE.

Notice Requisite to Due Process of Law.

5. Same—Due Process of Law—Notice.

Under a statute providing that lands may be added to a drainage district and taxed for drainage purposes, with no provision for notice to the owners thereof, the lands will be taken without due process of law.

6. Same—Drainage Districts—Void Proceedings May Be Validated.

Where an act for the formation of drainage districts provides for proceedings valid to a certain point, and void beyond that for want of provision for notice, the legislature may, by an amended act, cure the defect and validate the proceedings taken up to the point where the invalidity occurred.

7. Same—Retroactive Laws Laws Not Forbidden.

The Constitution of Iowa does not forbid the enactment of retroactive laws and the supreme court has frequently upheld the validity of such statutes.

8. Same—Constitutional Defect in Statute May Be Cured by Retroactive Amendment.

The legislature may by an amendment cure a constitutional defect in a statute the main purpose of which is within the scope of legislative power, and give such amendment a retroactive effect upon a proceeding already begun and pending under the original statute.

9. Same—Retroactive Statute for Notice.

The legislature has power by retroactive statute, to provide for notice to property owners whose lands were included in a drainage district, but who under the original statute were not entitled to notice, by reason of which fact the original act was unconstitutional.

10. Drainage Districts—Notice—Who Entitled to Object.

As a general proposition, no one is entitled to raise the objection that provision for notice to the interested parties is not made in a drainage statute except the parties entitled to the notice.

As to legal character of drainage districts, see note to People ex rel. Chapman v. Sacramento Drainage District, *ante*, p. 107.

As to constitutional power to establish drains and drainage districts, see note to Chicago, B. & Q. R. Co. v. Board of Supervisors of Appanoose County, *post*, p. 459.

As to source of legislative power to drain lands, see note to Coffman v. St. Frances Drainage District, p. —, vol. 3, this series.

As to whether action in regard to drainage is legislative or judicial, see note to Smith v. Claussen Park Drainage & Levee District, p. ——, vol. 2, this series.

As to public benefit and interest must be involved, see note to Campbell v. Youngson, p. ——, vol. 2, this series.

As to inclusion or exclusion of lands in drainage district, see IV, note to Hull v. Sangamon River Drainage District, *post*, p. 601.

As to power of commissioners, etc., see note to Seibert v. Lovell, *ante*, p. 261.

As to conclusiveness of decision of drainage commissioners and other officers, see notes to Chapman & Dewey Land Co. v. Wilson, p. ——, vol. 2, this series.

As to collateral attack on drainage proceedings, see note to Chapman & Dewey Land Co. v. Wilson, p. ——, vol. 2, this series.

As to waiver of irregularities in drainage proceedings, see note to Smith v. Claussen Park Drainage & Levee District, p. ——, vol. 2, this series.

As to bonds of drainage districts, see note to Sisson v. Board of Supervisors of Buena Vista County, p. ——, vol. 3, this series.

For historical review of reclamation districts in California, see People ex rel. Chapman v. Sacramento Drainage District, *ante*, p. 107.

11. Same—Waiver of Notice.

A landowner who did not receive notice of the organization of a drainage district, but who voluntarily appeared in the proceedings for prosecution and allowance of claims for damages, waives the objection of failure of notice.

12. Constitutional Law—District for Taxation—Notice.

The division by the state of a part of its territory into districts for taxation for public improvements is a legislative matter, and the citizen affected thereby is not entitled to notice of the exercise of the power.

13. Same—Delegation of Legislative Power.

That the legislative power for local purposes may be delegated to minor municipalities, is a matter of universal recognition and constant practice.

14. Same—Due Process of Law—Notice.

The provision of law that when a proceeding for establishing a drainage district has reached the stage where it is proposed to levy a tax, notice must be given the property owners, is sufficient to avoid the constitutional objection against taking property without due process of law, although no notice is required of the creation of the district or the determination of the aggregate amount of the tax to be collected.

15. Same—Right of Appeal.

Failure to provide for appeal from decisions of the board of supervisors creating a drainage district, does not render the law unconstitutional when the parties affected have ample opportunity to be heard before the board. Denial of the right to an appeal from one court to another is not of itself a denial of due process of law.

16. Same—Denial of Appeal.

Power to make a final determination beyond which there is no appeal must rest somewhere, and in the absence of express or clearly implied constitutional limita-

I. Must Be Given Opportunity to Test Validity.

A. In General.

By due process of law in a proceeding such as the formation of a drainage district, is meant notice and an opportunity of being heard, and the necessity therefor as prerequisite to the taking of private property by taxation, is uniformly recognized. In regard to the ordinary methods of assessment and valuation of property for taxation, whether for general or special purposes, the authorities are very nearly uniform, to the effect that it is necessary to the validity of the assessment that the property owner should have notice and an opportunity to be heard. Gatch v. City of Des Moines, 63 Iowa 718, 18 N. W. 310 (1884); Beebe v. Magoun, 122 Iowa 94, 97 N. W. 986, 101 Am. St. Rep. 259 (1904).

Wherever the amount of the tax to be exacted depends upon the exercise of the judgment and discretion of those fixing the value of the property or benefits by which such amount is to be measured, an opportunity for correction must be afforded. Trustees of Griswold College v. City of Davenport, 65 Iowa 633, 22 N. W. 904 (1885); Beebe v. Magoun, 122 Iowa 94, 97 N. W. 986, 101 Am. St. Rep. 259 (1904).

The power to tax is plenary, but taxation implies public interest, and in cases such as those of assessments for drainage it also implies proceedings *in pais* in some part of which the taxpayers have a right to take part and be heard. Any attempt to levy the burden in disregard of these principles must necessarily be inoperative, and where drains are constructed upon private property where a right to continue and keep them open has never been obtained, and they are therefore private property, a tax cannot be levied upon any portion of the public therefor, and even the owner of the land benefited cannot be taxed to

tions upon its authority in this respect, the legislature may confide that power in any given proceeding to any court or commission, and if the interested party be given notice and has an opportunity to be heard, then if the finding is against him, no constitutional guaranty is violated by denying him the right of appeal.

17. Same—What Constitutes "Due Process."

Due process of law does not necessarily imply judicial procedure in a court of record or right of trial by jury.

18. Drainage Assessments—Completion of Work.

The assessment for drainage may be made when the contract is let or the amount for which the drainage district is to be made liable is approximately ascertained, and need not be delayed until the work is completed.

Writ of certiorari to review proceedings resulting in assessment for cost of constructing ditch. Dismissed in trial court. Appeal by plaintiff. Affirmed.

For appellant—Nagle & Nagle.

For appellees—C. F. Peterson, D. C. Chase and S. Flynn.

WEAVER, J. Proceedings to procure the location and construction of the ditch were instituted by petition, as required by the terms of the statute, about March 13, 1903, and a bond to secure payment of costs

improve it unless public considerations are involved. People ex rel. Butler v. Board of Supervisors of Saginaw County, 26 Mich. 22 (1872).

The law providing for assessing, creating a lien upon, and selling at public vendue, lands found by commissioners likely to be improved by the drainage proposed, without any opportunity being given to the owners of the lands to object to the assessments made, either on the ground that the lands will not be benefited or that the assessments are unequal and unjust, is void, as taking property without due process of law. People ex rel. Pullman v. Henion, 64 Hun 471, 19 N. Y. Supp. 488 (1892).

The legislature cannot command an owner of land at his own expense, to drain his land for the private and individual use of his neighbor in the manner and to the extent that commissioners shall direct in a proceeding *ex parte* and without notice to him. This is not due process of law. Rutherford's Case, 72 Pa. St. 82, 13 Am. Rep. 655 (1872).

An act providing for formation of a district, assessments of land and sale to enforce the same without suit, no provision being made anywhere for a hearing by the landowners whose land is to be charged, is unconstitutional and a taking of the property without due process of law. Hutson v. Woodbridge Protection Dist., 79 Cal. 90, 16 Pac. 549, 21 Pac. 435 (1889).

Statutes requiring town trustees to keep ditches in repair, and to raise the necessary money therefor to apportion and assess the cost upon the lands which will be benefited thereby according to such benefits in his judgment, and making no provision for any notice to or hearing of the landowners, is void as contravening the provisions of the State and Federal Constitutions that no person shall be deprived of property without due process of law. Campbell v. Dwiggins, 83 Ind. 473 (1882); Tyler v. State ex rel. Wilson, 83 Ind. 563 (1882).

As to what is "due process of law," and constitutional requirement of the

and expenses was filed and approved. Thereupon the auditor placed a copy of the petition in the hands of an engineer, who made survey of the proposed improvement and on August 16, 1903, reported the same to the board of supervisors, with his estimate of the costs of construction. Beginning on March 9, 1903, notice of the proposed improvement was served personally or by publication upon the owners of the lands through which the ditch was to be constructed that the matter would come up for hearing at the regular June, 1903, session of the board. Certain claims for damage having been filed, appraisers were appointed, who filed their report August 17, 1903. At the September, 1903, session of the board further consideration of the matter was postponed until November 12, 1903, at which time the ditch was established, and its construction ordered. Before any further proceedings were had in the matter, this court having held chapter 2 of title 10 of the Code to be unconstitutional, in that it undertook to provide for an assessment of the cost of the ditch in part against the lands in the vicinity not intersected by or bordering upon such ditch, without any provision for notice to the owners of such lands (Beebe v. Magoun, 122 Iowa, 94, 97 N. W. 986, 101 Am. St. Rep. 259, and Smith v. Peterson, 123 Iowa, 672, 99 N. W. 552), the general assembly of the state undertook to remedy the defect thus disclosed. (See chapter 67, p. 59, Laws Thirtieth

same, see note, II, B, to Chicago, B. & Q. R. Co. v. Board of Supervisors of Appanoose County, *post*, p. 456.

As to injunction where due process of law is denied, see note, II, B, 2, to Chicago, B. & Q. R. Co. v. Board of Supervisors of Appanoose County, *post*, p. 456.

As to what is due process of law, see note, II, B, 1, to Chicago, B. & Q. R. Co. v. Board of Supervisors Appanoose County, *post*, p. 456.

As to remedy by injunction when due process of law denied see note, II, B, 2, to Chicago, B. & Q. R. Co. v. Board of Supervisors Appanoose County, *post*, p. 456.

B. "Due Process" if Given Opportunity.

Wherever by the laws of a state or by state authority, a tax, assessment, servitude or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice with such notice to the person or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceeding cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections. Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616 (1877).

Where a statute vests power to apportion benefits and burdens in the first instance in drainage commissioners, with the right of any landowner who feels himself aggrieved and who has filed objections before the commissioners, to appeal to the county court and have the classification of his lands reviewed, and also provides for a further appeal to the circuit court if the county court will allow it, otherwise, that the judgment

General Assembly, approved April 29, 1904.) Thereafter the board of supervisors proceeded with the matter of the construction of the ditch in question, following with substantial accuracy the provisions of the statute as amended by the Act of the Thirtieth General Assembly, and were about to assess the expense of such improvement upon the lands found to be benefited thereby, when this action was begun in certiorari to have the proceedings adjudged void. The foregoing history of the case is sufficiently full and specific to enable us to understand the force and effect of the points made by counsel in argument.

1. The first and principal contention on the part of the appellant is that the proceedings to secure the construction of the ditch having been begun under a void statute, the subsequent amendment, even though it had the effect to make the statute constitutional and valid, could have no effect to give life to the pending proceedings or authorize an assessment of the cost of the ditch thus constructed upon lands supposed to be benefited thereby. Assuming, for present purposes, that it is competent for the legislature to provide for the construction of a ditch for drainage purposes and the apportionment of the cost thereof as a special assessment upon lands thereby benefited, we think this objection cannot be sustained. Referring to the statute as it stood prior

of the county court is final, provides a complete and perfect remedy at law for the purpose of correcting any inequality in the classification, and equity will not interfere with the judgment of the court although it be claimed that the commissioners acted fraudulently in valuing their own lands too low, etc. Leonard v. Arnold, 244 Ill. 429, 91 N. E. 534 (1910).

Where provision is made for hearing a landowner on questions of fact and an opportunity is given him to present his legal objections, there is no taking of property without due process of law. Owners of Land v. People ex rel. Stookey, 113 Ill. 296 (1885).

Levy and collection of taxes for drainage purposes where assessment is reported and the party is given his day in court, is not a taking of property without due process of law within the meaning of either Federal or State Constitution. Hoertz v. Jefferson Southern Pond Draining Co., 119 Ky. 824, 27 Ky. L. Rep. 278, 84 S. W. 1141 (1905).

Where all owners are given opportunity to question both the validity and the amount of assessment before commissioners and in court, authority to make an equitable assessment does not authorize the taking of property without due process of law and is not in violation of the State or Federal Constitution. McMilanet v. Board of Com'rs Freeborn County, 93 Minn. 76, 100 N. W. 384 (1904).

The owner is not deprived of property without due process of law where he is given his day in court before the property is taken. Mound City L. & S. Co. v. Miller, 170 Mo. 240, 70 S. W. 721, 60 L. R. A. 190, 94 Am. St. Rep. 727 (1902).

Where a provision is made for notice and hearing, and an appeal before property can be appropriated there is no taking without due process of law. Cribbs v. Benedict, 64 Ark. 555, 44 S. W. 707 (1897).

A law imposing an assessment for a local improvement without notice to

to the amendment, we find that it provided for notice of the institution of the proceedings to the owners of lands intersected by or abutting upon the ditch. Code, § 1940. As to such owners it has never been held that, when thus brought into the proceedings, they were entitled to any further notice of the succeeding steps of the statute in letting the contract, classifying the lands, or making the apportionment of the costs and expenses. On the contrary, it seems to be well settled that a statute which provides for notice to the property owner at some stage of the proceedings before the assessment is made is not open to the constitutional objection simply because it does not provide for a new or additional notice of each successive step leading up to the assessment. Yeomans v. Riddle, 84 Iowa 147, 50 N. W. 886; Oliver v. Monona Co., 117 Iowa 43, 90 N. W. 510; Weyerhaueser v. Minnesota, 176 U. S. 550, 20 Sup. Ct. 485, 44 L. Ed. 583; Winona & St. P. Land Co. v. Minnesota, 159 U. S. 526, 16 Sup. Ct. 83, 40 L. Ed. 247; Voigt v. Detroit, 184 U. S. 115, 22 Sup. Ct. 337, 46 L. Ed. 459. The fatal objection to the proceeding under the statute in its original form was found in the further provision contained in Code, § 1946, whereby, when the construction had been determined upon, and an apportionment and assessment of the expense were to be made, it was provided

and a hearing or opportunity to be heard on the part of the owner of the property to be assessed has the effect to deprive him of his property without due process of law, and is unconstitutional. Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289 (1878).

Where commissioners are to determine by personal view what lands are to be taken for ditches, to file their determination in writing, and to give notice to all whom it may concern, and where any person feeling aggrieved has a right of appeal therefrom to the county court which shall hear the appeal on notice to the appellant, it cannot be said there is a taking of property without due process of law. Matter of Ryers, 72 N. Y. 1, 28 Am. Rep. 88 (1878).

If the law provides for giving notice and a method whereby the property owner may ultimately challenge the correctness of the assessment made against his property in respect to whether it was made in good faith without intervening mistake or error and according to the method and under the safeguards provided by the law, it does not violate the Fourteenth Amendment to the Federal Constitution. State ex rel. Latimer v. Henry, 28 Wash. 38, 68 Pac. 368 (1902).

Where an act provides for an appeal from the decision of commissioners in classifying lands for assessment from the amount of damages awarded for land taken or injured, from the taxes and benefits apportioned, and from all questions except as to the necessity of the drainage to promote the public health and welfare, there is no taking of private property without due process of law. State ex rel. Baltzell v. Stewart, 74 Wis. 620, 43 N. W. 947, 6 L. R. A. 394 (1889).

Where a landowner had full notice of all subsequent proceedings and was afforded an opportunity to question the validity of the formation of a drainage district and to object to the assessment

that the same should be charged not only upon the property through which the ditch was laid, and whose owners had been notified as aforesaid, but upon all other lands "in the vicinity" which a commission appointed for that purpose might find to be benefited by the improvement. No provision was made for notice to the owners of the additional lands sought thus to be taxed, and this we held to constitute a taking of property without due process of law as to such persons, and therefore unconstitutional. Smith v. Peterson, *supra;* Beebe v. Magoun, *supra.* In the Smith case we further held the statute to be of no force or effect against the owners of lands intersected by the ditch and upon whom the notice required by section 1940 had been served, not because it was unconstitutional as to such persons, but because the void provision as to "lands in the vicinity" appeared to be such an essential feature of the scheme or plan sought to be effected that its elimination would lead to results not contemplated by the legislature, and defeat the purposes which the statute was intended to promote. In other words, the methods of the statute were constitutional and valid up to the point where the report of the commissioners appointed to classify the benefited lands and apportion thereto the cost of the improvement was returned to the board, but the failure to provide for

of damages and benefits, all the requirements of due process of law were met, although the original notice may have been defective. Wilkinson v. Gaines, 96 Miss. 688, 51 So. 718 (1910).

Where an act for the formation of drainage districts provides proceedings valid up to a certain point, and void beyond that for want of provision for notice, the legislature may by an amended act cure the defect and validate the proceedings taken up to the point where the invalidity occurred. Ross v. Board of Supervisors Wright County, 128 Iowa, 427, 104 N. W. 506, principal case.

II. Immaterial at What Stage Given.

A. In General.

It is settled that if provision is made for notice to and hearing of each proprietor at some stage of the proceedings upon the question of what proportion of the tax shall be assessed upon his land, there is no taking of property without due process of law. Paulsen v. Portland, 149 U. S. 30, 13 Sup. Ct. 750, 37 L. Ed. 637 (1892); Ross v. Board of Supervisors Wright County, 128 Iowa 427, 104 N. W. 506, principal case; Rogers v. St. Paul, 22 Minn. 494 (1876); Kelly v. Minneapolis, 57 Minn. 294, 59 N. W. 304, 26 L. R. A. 92, 47 Am. St. Rep. 605 (1894); People v. Mayor of Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266 (1851); Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841 (1902); State ex rel. Baltzell v. Stewart, 74 Wis. 620, 43 N. W. 947, 6 L. R. A. 394 (1889).

The manner of giving notice or specific period of time in the proceedings when the party may be served is not very material, so that reasonable opportunity is afforded before he has been deprived of the property or a lien thereon is fixed. King v. City of Portland, 184 U. S. 61, 46 L. Ed. 431, 22 Sup. Ct. 290 (1902); Voigt v. City of Detroit, 184 U. S. 115, 46 L. Ed. 459,

notice to all the owners of property thus affected before confirmation of such report rendered ineffectual and void any attempt to make and enforce a valid assessment. The proceedings relating to the ditch in controversy reached just this state of advancement before the amendment to the statute found in chapter 67, p. 59, Laws Thirtieth General Assembly, was enacted. That amendment leaves the statute unchanged as to all the proceedings in such cases from the filing of the petition up to the return or report made by the commissioners appointed to classify the benefited lands and apportion the expenses, and provides that when this stage is reached a time shall be fixed for hearing objections thereto, and notice thereof shall be served personally upon residents and upon non-residents by publication, and upon such hearing the board is empowered to determine all objections to the assessment, and may increase, diminish, annul, or affirm the apportionments made in the commissioners' report, or any part thereof, as shall be found just and equitable. By section 2 of the amending Act this amendment was made to apply to all proceedings then pending before the boards of supervisors for the location and construction of drains. Was it competent for the legislature to thus provide and authorize the defendants, with other boards of supervisors having similar proceedings in hand, to cause proper

22 Sup. Ct. 37 (1902); Oliver v. Monona County, 117 Iowa 43, 90 N. W. 510 (1902); King v. City of Portland, 38 Or. 402, 36 Pac. 63, 55 L. R. A. 812 (1900).

Where an opportunity to be heard either before or after the levying of the assessment is given, there is no taxing of property without due process of law. People ex rel. Chapman v. Sacramento Drainage District, 155 Cal. 373, 103 Pac. 207, *ante*, p. 107.

B. In Action to Enforce Assessment.

Assessments for reclamation in California can be collected only by suit, and opportunity is there afforded the landowner to be heard respecting the assessment. He may set forth by way of defense all his grievances, and therefore levying of the assessment cannot be the taking of property without due process of law. Hagar v. Reclamation District No. 108, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569 (1883).

Where no property can be taken until after a full hearing in a suit to recover assessments in which legality of all proceedings may be contested and adjudged, it cannot be said that property is taken without due process of law. Reclamation Dist. No. 108 v. Hagar, 4 Fed. 366 (1880).

Where an assessment can only be enforced by suit in which the landowner is given notice and an opportunity to be heard, and in which he may set forth by way of defense all his grievances, he is given all that the guaranty of due process of law requires and secures. Reclamation Dist. No. 108 v. Evans, 61 Cal. 104 (1882); Reclamation Dist. No. 3 v. Goldman, 65 Cal. 635, 4 Pac. 676 (1884).

All questions involving the regularity of the assessment proceedings, the amount of the charge as compared with the benefit conferred and the fact that the cost was apportioned in proportion to the benefits, are open to investigation

notice to be served, and proceed thereon to make an apportionment and assessment of the cost of the ditch? In our judgment, this question must be answered in the affirmative. The Constitution of Iowa does not forbid the enactment of retroactive laws, and this court has frequently upheld the validity of such statutes. Land Co. v. Soper, 39 Iowa 112; Tilton v. Swift, 40 Iowa 78; McMillan v. Co. Judge, 6 Iowa 391; Huff v. Cook, 44 Iowa 639; Sully v. Kuehl, 30 Iowa 275; State v. Squires, 26 Iowa 340; Galusha v. Wendt, 114 Iowa 597, 87 N. W. 512; Savings & L. Ass'n v. Heidt, 107 Iowa 297, 77 N. W. 1050, 43 L. R. A. 689, 70 Am. St. Rep. 197; Windsor v. Des Moines, 110 Iowa 175, 81 N. W. 476, 80 Am. St. Rep. 280; Ferry v. Campbell, 110 Iowa 290, 81 N. W. 604, 50 L. R. A. 92; Fair v. Buss, 117 Iowa 164, 90 N. W. 527; Clinton v. Walliker, 98 Iowa 655, 68 N. W. 431. That the legislature may by amendment cure a constitutional defect in a statute the main purpose of which is within the scope of legislative power, and give such amendment retroactive effect upon cases already begun and pending, is expressly held by this court in Ferry v. Campbell, *supra*. In that case proceedings had been begun to enforce a collateral inheritance tax under a law which was found to be unconstitutional for want of provision for notice to parties in interest. Pending the proceedings, the statute was amended, providing for notice in such cases and making the

in a suit to foreclose an assessment lien, where the validity of such assessment has not been theretofore adjudged in an action to establish its validity. Lower Kings River Reclamation Dist. v. Phillips, 108 Cal. 306, 39 Pac. 630, 41 Pac. 335 (1895); Swampland Reclamation Dist. No. 341 v. Blumenberg, 156 Cal. 532, 106 Pac. 389 (1909).

Where the law provides for the enforcement of the assessment by a civil action, it does not violate the Fourteenth Amendment to the Federal Constitution, for the owner may in that action set up any objections or exceptions that he may have. State ex rel. Latimer v. Henry, 28 Wash. 38, 68 Pac. 368 (1902).

C. In Action to Test Assessment.

A property owner is entitled to a hearing at one time or another upon the question of benefit, and the statute providing for action by the district to test the validity of an assessment gives opportunity for this hearing, and is not unconstitutional. Lower Kings River R. Dist. No. 531 v. McCullah, 124 Cal. 175, 56 Pac. 887 (1899).

Where the law provides for action to test the validity of an assessment levied by a reclamation district, and that the court shall decree the validity or invalidity of the assessment in accordance with what the court may determine the facts to be, the landowner, if such action be brought, has the opportunity of being heard and cannot thereafter test the validity of the assessment in an action to foreclose the same. Swamp Land Dist. No. 341 v. Blumenberg, 156 Cal. 539, 106 Pac. 389 (1909).

III. Legislature May Prescribe Mode.

A. In General.

In a case where notice is necessary the legislature may provide what notice shall be given and the manner in which it must be given. Porter v. Stout,

amendment applicable to cases there undetermined. Acts 27th Gen. Assem., p. 27, c. 37, § 2. This we found to be a valid exercise of legislative power, so far at least as it related to personal estate; and unless we propose to overrule that precedent—which we are not prepared to do—we see no way to avoid giving like effect to the amendment to the drainage act with which we are now dealing. The same principle is recognized and upheld in several of the Iowa cases above cited.

Appellant's claim that the amendatory act was not intended to have a curative effect upon proceedings then pending is clearly opposed to the language employed therein. It was the apparently studied purpose of the legislature to remove the objection based upon the failure of the law to provide for notice to the landowners, and to give legal force and effect to proceedings then pending and liable to be rendered nugatory if such defect was not cured. While the term "legalized" is not expressly applied to the preliminary proceedings already had, section 2 of the amendment hereinbefore quoted would be idle and meaningless if they are not to be considered valid and sufficient to sustain the assessment made pursuant to the notice for which the act provides. The principle which we here apply was affirmed by us in Butts v. Monona County, 100 Iowa 74, 69 N. W. 284. Perhaps no case can be found more nearly in point than Spencer v. Merchant, 125 U. S. 345, 8 Sup. Ct. 921, 31 L. Ed. 763. In that case, under a statute authorizing the same, a city ordered a work of local improvement to be made. The

73 Ind. 3 (1880); Carr v. State, 103 Ind. 548, 3 N. E. 375 (1885); Indianapolis, etc., Gravel Road Co. v. State, 105 Ind. 37, 4 N. E. 316 (1886); Baldwin v. Moroney, 173 Ind. 574, 91 N. E. 3 (1910).

It is competent for the legislature to provide what notice shall be given upon the formation of a drainage district, and for the assessment of the lands therein, and where the notice is of the character prescribed by statute it is sufficient, and a lien may be fixed upon the land through constructive notice. Killian v. Andrews, 130 Ind. 579, 30 N. E. 700 (1892).

B. All Affected Entitled to.

Those landowners whose lands are "affected" by the proposed improvement are not confined, within the meaning of the act, to those whose lands are assessed therefor. The term has a broader signification, and includes all whose property rights are thereby appropriated, and the extent of the appropriation is not material. If "affected" the landowner is entitled to have his day in court to have his damages assessed. Neff v. Sullivan, 9 Ohio Dec. 765, 768, 19 Cinc. L. Bul. 168 (1886).

As to collateral attack on the giving and sufficiency of notice, see note, II, B, to Chapman & Dewey Land Co. v. Wilson, p. ——, vol. 2, this series.

IV. Statutory Notice Jurisdictional.

A. In General.

Where giving of notice is required by statute, it is essential, and a failure to give it is fatal to the jurisdiction of the commissioners to act. Commissioners of Mason & Tazewell Special Drainage Dist. v. Giffin, 28 Ill. App. 561 (1887).

work was done and the tax levied. After the levy had been made, and part of the property owners had paid the tax, other owners resisted payment, and were successful in having the proceedings adjudged void because the statute failed to provide for any notice, and was therefore unconstitutional. Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289. After this adjudication was had, the legislature passed another act authorizing a relevy of such tax after due notice to the owners who had refused to pay their original apportionment. The validity of this legislation was affirmed by the Court of Appeals of New York (Spencer v. Merchant, 100 N. Y. 585, 3 N. E. 682), and reaffirmed by the Supreme Court of the United States, as above cited. The arguments there used against the validity of the later statute followed the same lines pursued by counsel in the case at bar, and were held unsound by the highest court of New York and of the nation. We do not stop to quote from these opinions, but those who care to pursue the inquiry will find the question there fully and exhaustively considered.

2. At the time the ditch was located the records of the county indicated that one of the tracts of land intersected by it belonged to one Pratt, a resident of New York, and notice directed to him was served by publication. It appears, however, that Pratt had died before the proceedings were instituted, and a minor daughter, Helen Portia Pratt, was the real owner, and the person upon whom the notice should have been served. Later, however, and after the order of November 12, 1903, establishing the ditch, Helen Portia Pratt, by her guardian, appeared to

Where the statute provides for giving of notice to owners, the failure to give such renders the proceeding absolutely void as to any owner to whom notice is not given. Bixby v. Goss, 54 Mich. 551, 20 N. W. 581 (1884).

Where the statute provides for giving notice on report of viewers being filed, the giving of such notice is essential to the jurisdiction of the commissioners, and unless such notice be given, they have no power to proceed. Cullen v. Board of County Commissioners of Sibley County, 47 Minn. 313, 50 N. W. 237 (1891).

The failure to give notice may be taken advantage of, although the statute provides that judgment establishing drain or district is conclusive as to the regularity of all proceedings. Scott v. Brackett, 89 Ind. 413 (1883).

Where notice is required, the jurisdiction of the commissioners to make an assessment is based upon the notice, and not upon the voluntary appearance of any of the landowners. Wabash Eastern Railroad Co. of Illinois v. Commissioners East Lake Fork Special Drainage Dist., 134 Ill. 384, 25 N. E. 781, 10 L. R. A. 285 (1890).

Where the statute provides for notice by publication for twenty days, proceedings based upon a notice published for only eighteen days are void, the publication being essential to the authority of the commissioners to act, and the fact that the publication was not made is a fatal defect and consequently defeats jurisdiction. Drainage Commissioners v. Giffin, 134 Ill. 330, 25 N. E. 995 (1890).

Where notice is required and where some notice is given, it is sufficient,

the proceedings, and filed a claim for damages, which was allowed, and the allowance was thereafter approved by the district court having jurisdiction of the guardianship matter. Counsel for appellant now contends that, even if chapter 67, p. 59, Laws Thirtieth General Assembly, be given retroactive effect, and made applicable to proceedings then pending, the failure to include Helen Portia Pratt in the notice pursuant to Code, § 1940, is a fatal defect, and the board of supervisors and county auditor never obtained jurisdiction to inaugurate the proceedings, and that each and all of the orders subsequently made are therefore wholly void. This position is sought to be supported by certain decisions of this court in cases relating to the establishment or vacation of public highways. See R. R. v. Ellithorpe, 78 Iowa 415, 43 N. W. 277, and Moffit v. Brainard, 92 Iowa 122, 60 N. W. 226, 26 L. R. A. 821. But neither of these cases, nor any other which we have been able to discover, go to the extent claimed by counsel. The most that can be said as to this class of cases is that they apply the fundamental rule that no person's property can be taken from him by a court or other tribunal without notice and an opportunity to be heard. Generally speaking, at least, no one is entitled to raise the objection except the party entitled to the notice. Assume, for instance, that proceedings for the establishment of a highway several miles in length, and passing through the lands of many different persons, are instituted, carried through to the final order, and the road is established and opened to travel. If, a year or two later, it be discovered that a nonresident owner of a single small

even though such notice may not have been in strict compliance with the statute. Daly v. Cubbins, 107 Ind. 105, 82 N. E. 659 (1907); Daly v. Higman, 43 Ind. App. 357, 87 N. E. 669 (1909); Smith v. Pyle, 44 Ind. App. 150, 88 N. E. 733 (1909).

B. Requisite of, Implied.

Although the statute is silent on question of notice, its necessity is implied where private property is invaded, and notice must be given of all original and adjourned proceedings for appointment of commissioners, etc. Swan v. Williams, 2 Mich. 427 (1852); Strachan v. Brown, 39 Mich. 168 (1878).

V. Constructive Notice.

Proceedings for drainage are proceedings *in rem*, and therefore constructive notice is sufficient. Otis v. De Boer, 116 Ind. 531, 19 N. E. 317 (1889).

Constructive notice meets the requirement of "due process of law." Vizzard v. Taylor, 97 Ind. 90 (1884); Carr v. State, 103 Ind. 548, 3 N. E. 375 (1885); Killian v. Andrews, 130 Ind. 579, 30 N. E. 700 (1892); Re Drainage Application, etc., 35 N. J. L. (6 Vr.) 497 (1872); Cupp v. Seneca County Comm'rs, 19 Ohio St. 173 (1869).

Provision for constructive notice by posting does not render an act providing for the formation of a drainage district unconstitutional. Scott v. Brackett, 89 Ind. 413 (1883).

Notice by publication of petition for formation of a drainage district and assessing benefits, is sufficient, and constitutes due process of law. Johnson v.

tract was by some mistake omitted from the notice for which the statute provides, we may concede that as to such land and such owner the order of establishment is voidable or void; but it would be a somewhat startling proposition to hold that failure to notify this one owner is a jurisdictional defect of which every other owner along the line may take advantage, even though he himself was duly and properly notified. Moreover, when the omitted owner voluntarily appeared to the proceedings, and procured an allowance of her claim for damages, we think it will be held to operate as a waiver by her of all objections based upon the failure to serve her with notice. The only interest the other landowners could have in her being properly made a party was that her property might be compelled to bear its share of the expense in case the ditch should be constructed, and when she voluntarily appeared the only possible ground of objection on their part was removed. Poundstone v. Baldwin, 145 Ind. 139, 44 N. E. 191; Hauser v. Burbank, 117 Mich. 642, 76 N. W. 111; Wolpert v. Newcomb, 106 Mich. 357, 64 N. W. 326; Hurst v. Martinsburg, 80 Minn. 40, 82 N. W. 1099. Under the law of the cases here cited—and we find none to the contrary—it is entirely immaterial whether a guardian is authorized to waive service of notice upon his ward, and we need not here pass upon that question. Had the notice been served, the ward could have done no more than to appear by guardian for the protection of her rights. He did so appear, and brought the matter before the court for its consideration and approval. If notice to the ward was necessary to bind her by such approval, we must assume in this collateral proceeding that the court did not act without it.

Board of Supervisors Story County (Iowa), 126 N. W. 153 (1910).

Act providing for publication of notice to all persons interested in the assessment, and giving them thirty days in which to file exceptions thereto, does not deprive an owner of property without due process of law. Caton v. Western Clay Drainage Dist., 87 Ark. 8, 112 S. W. 145 (1908).

VI. Continuing Notice.

A statute which provides notice to the property owner at some stage of the proceeding, is not open to the constitutional objection simply because it does not provide for a new or additional notice of each successive step leading up to the assessment. Winona & St. P. Land Co. v. Minnesota, 159 U. S. 526, 16 Sup. Ct. 83, 40 L. Ed. 247 (1895); Weyerhaueser v. Minnesota, 176 U. S. 550, 20 Sup. Ct. 485, 44 L. Ed. 582 (1900); Voigt v. Detroit, 184 U. S. 115, 22 Sup. Ct. 337, 46 L. Ed. 459 (1902); Oliver v. Monona County, 117 Iowa 43, 90 N. W. 510 (1902); Ross v. Board of Supervisors Wright County, 128 Iowa 427, 104 N. W. 506, principal case.

Where a statute provides for the formation of a reclamation district and the levying of assessments, requiring that on presentation of petition setting forth a description of lands of which it is desired to have the district formed, with the names of the owners, if known, etc., a notice of hearing shall be given by publication, after the formation of the

3. The statute as amended provides, as we have seen, for the appointment of commissioners who examine the lands with the view of determining what tracts are benefited by the improvement, classify them as "low," "wet," "swamp," and "dry," and fix their estimate of the proportion of the expense which each tract ought to bear. In effect, their report is a designation of the boundaries or territorial extent of the drainage district and a statement of the finding of the commissioners as to a just and equitable distribution of the cost upon the several tracts of land embraced in the territory so marked out by them. Appellant takes the position that the landowner is entitled to notice and hearing as to the extent of this district, and whether his land shall be included therein, and that the failure to provide for such notice and hearing renders the statute unconstitutional. In our opinion, the objection is unsound. The division of a state or lesser municipal territory into districts for the purposes of taxation or public improvement is a legislative matter, and the citizen affected thereby cannot complain because the power is exercised without notice to him. If, for instance, the legislature saw fit to divide the entire state into drainage districts, and make the lands in each district chargeable with the expense of such drains therein as the public welfare might demand, we apprehend that such legislation would be open to no serious constitutional objection on the ground that it deprives the landowner of property rights without due process of law. That such legislative power for local purposes may be delegated by the legislature to minor municipalities is a matter of universal recognition and constant practice. For example, a city may, by its council, divide its

district no other or further notice to owners is required to be given, but proceedings are to be had for the election of trustees, levying of assessments, etc. If an assessment remains unpaid, provision is made for bringing an action against the delinquent owner. Such statute does not conflict with the Fourteenth Amendment of the Constitution of the United States. Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616 (1877); Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. Ed. 569 (1884); Reclamation Dist. No. 3 v. Goldman, 65 Cal. 635, 4 Pac. 676 (1884); Reclamation Dist. No. 108 v. Hagar, 66 Cal. 54, 4 Pac. 945 (1884).

Where a ditch has been established under statutes prescribing notice, the reopening or repairing of the same may be done and the costs assessed without other notice than the previous construction of the ditch and the law afforded. The jurisdiction acquired by the original petition, notice, and other proceedings continues, and the duty of exercising that jurisdiction is imposed upon the board of supervisors. The notice was continuing, and the owners of the land within the district created by the location of the ditch and levy of taxes were bound to avail themselves of the statutory remedies without any other information, the same as in the case of general taxation. Yeomans v. Riddle, 84 Iowa 147, 50 N. W. 886 (1891); Beebe v. Magoun, 122 Iowa 94, 97 N. W. 986, 101 Am. St. Rep. 259 (1904).

territory into sewer districts (Code, § 794), or the entire city may be declared a single district, and the cost of a sewer be made a general charge upon all the property within its boundaries; and the fact that an individual property owner has been given no hearing in the matter of the districting, or that he may believe that his property is in no manner benefited by the improvement, affords him no ground for impeaching the validity of the statute or ordinance by which the districting was accomplished. Other familiar instances of the exercise of this delegated legislative power will probably occur to the intelligent reader. State v. King, 37 Iowa 462; State ex rel. Witter v. Forkner, 94 Iowa 1, 62 N. W. 772, 28 L. R. A. 206; Topeka v. Huntoon (Kan. Sup.), 26 Pac. 488; Robinson v. Schenck, 102 Ind. 307, 1 N. E. 698; Kinney v. Zimpleman, 36 Tex. 554; Stanfill v. Court, 80 Ala. 287; Dunn v. Wilcox Co., 85 Ala. 144, 4 South. 661; Hyde Park v. Spencer, 118 Ill. 446, 8 N. E. 846; Turner v. Detroit, 104 Mich. 326, 62 N. W. 405; State ex rel. Baltzell v. Stewart, 74 Wis. 620, 43 N. W. 947, 6 L. R. A. 394. The very objection here raised by appellant was involved in Voigt v. Detroit, 123 Mich. 547, 80 N. W. 253. And see same case on appeal, 184 U. S. 115, 22 Sup. Ct. 337, 46 L. Ed. 459. In the cited case the Michigan court says: "No provision is made for a notice to property owners of a time and place for hearing upon either the question of fixing a taxing district or the question of the amount of the award to be spread thereon. This, it is claimed, leads to taking property without due process of law, and is unconstitutional. The statute provides for a hearing in relation to the proportion each piece of

VII. Of Establishment and Hearing as to Necessity.

If provision is made for notice and hearing where proceeding has reached the stage where it is proposed to levy a tax, it is sufficient, although no notice is required of the creation of the district or the aggregate amount of the assessment or tax to be levied. Voigt v. City of Detroit, 123 Mich. 547, 82 N. W. 253 (1900); Voigt v. City of Detroit, 184 U. S. 115, 22 Sup. Ct. 337, 46 L. Ed. 459 (1902); Ross v. Board of Supervisors Wright County, 128 Iowa 427, 104 N. W. 506, principal case.

The California Act of 1885 (St. 1885, p. 204), providing for the formation of drainage districts, is not unconstitutional as failing to require notice of hearing of petition for formation of district or concerning assessments to be imposed. Laguna Drainage Dist. v. Chas. Martin Co., 144 Cal. 209, 77 Pac. 933 (1904).

The division of the state or parts thereof into districts for the purpose of taxation or local improvement is a legislative matter, and the citizen affected thereby cannot complain because the power is exercised without notice to him. Even dividing the entire state into such districts would not be open to the constitutional objection of depriving the landowners of property rights without due process of law. Ross v. Board of Supervisors Wright County, 128 Iowa 427, 104 N. W. 506, principal case.

Under the Michigan Statute, owners of lands liable to be assessed for benefits from drain, but not of lands abutting

property shall bear to the whole of the improvement, and the proper notice of this hearing was given. It is claimed by counsel that complainant was entitled to notice of the hearing relating to the establishment of the assessment district and of the amount of the total assessment, and because the statute does not provide for these notices it is unconstitutional as taking property without due process of law. We do not think this proposition of counsel can be maintained. The right of the legislature to establish special assessment districts in which all the taxes necessary to be raised to pay for a local improvement may be assessed, was for a long time questioned, but that right has so often been sustained by the courts that it is no longer an open question." After citing authorities, the court proceeds: "Under these authorities it is very clear that the legislature might have established the special assessment district. Had it seen fit to do so, would it be claimed that its right to do so could have been questioned as unconstitutional because no notice was given to the property holders affected thereby that it intended to establish such a district? If the answer to this question should be in the negative, why, when the legislature has delegated to the common council of the city the right to establish the special district, should it be said that the law delegating this power is unconstitutional because notice is not required? The establishment of the special assessment district in the one instance by the legislature and in the other instance by the council is the exercise of a legislative power, with which the courts will not ordinarily interfere." Upon appeal to the United States Supreme Court the judgment of the state court was affirmed. The

the drain, have no right to notice or to take part in the proceedings for the establishment of the drain until the letting thereof and the designation of their lands as part of the assessment district, and they have no constitutional right to be heard upon the necessity for the drain. Roberts v. Smith, 115 Mich. 5, 72 N. W. 1091 (1897); Hinkley v. Bishopp, 152 Mich. 256, 114 N. W. 676 (1908).

VIII. Of Proceedings to Add Lands.

Under the law providing that drainage commissioners may at any time enlarge the boundaries of their district by attaching new areas of land which are involved in the same system of drainage, and require for outlets the drains of the district made or proposed to be made, as the case may be, on the petition of a greater proportion of the landowners of the district, so enlarged, as is required for an original district, but failing to provide the mode of procedure or notice to be given of the land sought to be annexed, it cannot be assumed that the legislature's intent was to vest the commissioners with power to annex adjoining lands and subject the same to extraordinary burdens without securing to the owners a right to notice and to be heard, and as careful and elaborate provisions are made for notice, etc., in the law providing for the original formation of the district, it must be assumed that the legislature deemed it unnecessary to repeat those provisions, leaving it to the courts to import into that section as matter of

provision of law by which, when the proceeding has reached the stage where it is proposed to levy the tax, a notice must be served on the property owners, was held sufficient to avoid the constitutional objection, notwithstanding no notice is required in respect to the creation of the district or the determination of the aggregate amount of the tax to be collected. See, also, to the same effect, State ex rel. Baltzell v. Stewart, *supra;* People v. Mayor, 4 N. Y. 419, 55 Am. Dec. 266; Rogers v. St. Paul, 22 Minn. 494; Kelly v. Minneapolis, 57 Minn. 294, 59 N. W. 304, 26 L. R. A. 92, 47 Am. St. Rep. 605; Erickson v. Cass Co., 11 N. D. 494, 92 N. W. 841; Paulsen v. Portland, 149 U. S. 30, 13 Sup. Ct. 750, 37 L. Ed. 637. In the last-cited case the rule is thus stated: "It is settled that if provision is made for notice to and hearing of each proprietor at some stage of the proceedings upon the question of what proportion of the tax shall be assessed upon his land, there is no taking of property without due process of law." In the case before us there is, under the statute, as amended, ample provision for notice to every landowner, and opportunity given for the hearing of all objections he may have to assert against the validity and justice of the proposed charge upon his property. This, under the law, is all he can rightfully ask. It is to be noted, moreover, that upon the hearing which the statute gives the owner pursuant to the notice provided for by the amendment, the board of supervisors may not only increase or diminish the apportionment of the tax reported by the commissioners, but may "annul" it entirely. The action of the board at this meeting is the final and authoritative settlement of

construction, the rules as to notice applicable to the formation of the original district, for so far as the land annexed is concerned, the annexation proceedings constitute its original organization into a district. Drainage Commissioners v. Giffin, 134 Ill. 330, 25 N. E. 995 (1890).

Where upon hearing a petition, certain lands described therein are excluded and other lands are included, notice as required by law to be given the owners of lands described in the petition must be given to the owner of the lands added thereto, or the organization is void. Sanner v. Union Drainage Dist. No. 1, 175 Ill. 575, 51 N. E. 875 (1898).

The act providing for adding lands "in the vicinity" to a district without provision for notice to the owners thereof, is void as a taking of the property added without due process of law, and void as to others to whom notice is given where the taking of the lands "in the vicinity" is such an essential feature of the scheme or the place sought to be affected that its elimination would lead to results not contemplated by the legislature. Smith v. Peterson, 123 Iowa 672, 99 N. W. 552 (1904); Ross v. Board of Supervisors Wright County, 128 Iowa 427, 104 N. W. 506, principal case.

As to adding lands to district and changing boundaries of districts, see note, II, C and I, to Hull v. Sangamon River Drainage District, *post,* pp. 596, 599.

IX. Of Formation of Subdistrict.

As to formation of subdistricts, see note, III, B, to Hull v. Sangamon River Drainage District, *post,* p. 600.

the boundaries of the taxing district, and this is done only after full opportunity is given to each landowner to show cause, if he has any, why his land should not be included therein. It is not denied that the notice required by the amended statute was given, and plaintiff given full opportunity to be heard, and the objection here made is not well taken.

4. The constitutionality of the act is further questioned because by Code, § 1947, which allows an appeal from the assessment made by the board of supervisors, it is also provided that upon the trial of the appeal it shall not be competent for the owner to show that his land received no benefits from the improvement. Counsel seem to contend that the landowner is thus cut off from all opportunity to be heard on the question whether his land receives any benefit by reason of the ditch for the construction of which he is taxed. But, as noted in the concluding part of the preceding paragraph, this is a mistake. The landowner is given opportunity to appear before the board of supervisors, which body is authorized to try all such objections, and if it be found that any tract of land reported by the commissioners is not in fact benefited by the improvement, it may be relieved of the burden. The effect of the restrictive clause in Code, § 1947, is to deny the right of appeal from this finding of the board of supervisors, and confine all further review to the question whether the appellant's land has been assessed in equal and fair proportion, as compared with other property embraced in the district. That a statute making the finding of the board conclusive upon the ques-

An act providing for formation of a subdistrict including lands of petitioners therefor and lands over which the necessary drains thereof will run, providing for notice to owners of lands to be included and giving them an opportunity to be heard, is not a taking without due process of law, but if other lands are included in the subdistrict, the owners of which are given no notice and no opportunity to be heard, the inclusion of their lands would be a taking without due process of law. Dewell v. Commissioners of S. N. Y. Levee Drainage Dist., 232 Ill. 215, 83 N. E. 811 (1908).

X. Of Change of System.

Notice need not be given of change of system of drainage by commissioners and of additional assessment to pay cost thereof. Reynolds v. Milk Grove Special Drainage Dist., 134 Ill. 268, 25 N. E. 516 (1890).

XI. Of Adjourned Meeting.

Notice of adjourned meeting is not necessary where the adjournment is taken in open session. Kinnie v. Bare, 80 Mich. 345, 45 N. W. 345 (1890).

XII. Who May Object to Want of.

A. In General.

As a general proposition, no one is entitled to object for want of notice except the party who is himself entitled to notice. Ross v. Board of Supervisors Wright County, 128 Iowa 427, 104 N. W. 506, principal case.

Failure to give notice to one landowner cannot be set up by another, except where the effect of such failure is to prevent the construction of the drain.

tion whether a given tract of land is properly included in the benefited district, and denying appeal therefrom, is not an unconstitutional deprivation of property without due process of law, is a rule which has been affirmed by the great weight, if not the universal current, of authority. The right to an appeal from one court or tribunal to another has never been held to be in itself a denial of due process of law. The power to make a final determination beyond which there is no appeal must rest somewhere, and in the absence of express or clearly implied constitutional limitations upon its authority in this respect, the legislature may confide that power in any given proceeding to any court, board, or commission. Of course, the tribunal thus designated must observe due process of law—that is, the party must be given notice and have opportunity to be heard—but if the finding be against him, no constitutional guaranty is violated by denying him the right of appeal. Such is clearly the doctrine of our cases. Chambliss v. Johnson, 77 Iowa 612, 42 N. W. 427; Lambert v. Mills Co., 58 Iowa 666, 12 N. W. 715; Allerton v. Monona, 111 Iowa 560, 82 N. W. 922; Oliver v. Monona, 117 Iowa 43, 90 N. W. 510. To the same point, see State ex rel. Hughes v. Dist. Court, 95 Minn. 70, 103 N. W. 744; State ex rel. Baltzell v. Stewart, 74 Wis. 620, 43 N. W. 947, 6 L. R. A. 394; Dickson v. Racine, 66 Wis. 545, 21 N. W. 620; Teegarden v. Racine, 56 Wis. 545, 14 N. W. 614; Rogers v. St. Paul, 22 Minn. 494; Weaver v. Templin, 113 Ind. 298, 14 N. E. 600; Reeves v. Grottendick, 131 Ind. 107, 30 N. E. 889; Klein v. Tuhey, 13 Ind. App. 74, 40 N. E. 144; Hibben v. Smith, 191 U. S. 310, 24 Sup. Ct. 88, 48 L. Ed. 195; Waterworks v. Schottler, 110 U. S. 347, 4 Sup. Ct. 48, 28 L. Ed. 173; Bonfoy v. Goar,

Grimes v. Coe, 102 Ind. 406, 1 N. E. 735 (1885); Pittsburg C. C. & St. L. R. Co. v. Machler, 158 Ind. 159, 63 N. E. 210 (1902); Wolpert v. Newcomb, 106 Mich. 357, 64 N. W. 326 (1895).

Defect of notice to certain landowners will not affect the proceeding as to those who were notified. Carr v. Boone, 108 Ind. 241, 9 N. E. 110 (1886).

B. Proceedings Set Aside.

But the whole proceeding should be set aside on application of any party who has not been given the required notice. Sites v. Miller, 120 Ind. 19, 22 N. E. 82 (1889).

XIII. Waiver of Notice.

A. In General.

Although landowners by appearing in proceedings for formation of a district, may waive defects, etc., where proper notice is not give and jurisdiction not acquired, generally, each landowner of the district, whether he appeared and contested the organization of the district or not, has such interest in the question of the legality of the organization as to the lands of the other owners as would give him the right in any proper proceedings brought to test the question, to allege want of jurisdiction of the persons of the land holders of the district and of the land owned by them, and to insist that for that reason the entire organization of the district was illegal and void, and the same rule applies to the annexation of lands to a district already formed. Drainage Commissioners v. Giffin, 134 Ill. 330, 25 N. E. 995 (1890).

140 Ind. 292, 39 N. E. 56; Spencer v. Merchant, 125 U. S. 345, 8 Sup. Ct. 921, 31 L. Ed. 763; Re Fowler, 53 N. Y. 60; Dodge Co. v. Acom, 61 Neb. 376, 85 N. W. 292; Griffith v. Pence, 9 Kan. App. 253, 59 Pac. 677; Joplin M. Co. v. Joplin, 124 Mo. 129, 27 S. W. 406; Gillett v. McLaughlin, 69 Mich. 547, 37 N. W. 551; Bowersox v. Seneca, etc., 20 Ohio St. 496; People v. Hagar, 66 Cal. 59, 4 Pac. 951; Britton v. Blake, 35 N. J. Law, 208; Britton v. Blake, 36 N. J. Law, 442; Hagar v. District, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569; Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616. "Due process of law" does not necessarily imply judicial procedure in a court of record or right of trial by jury. Re Bradley, 108 Iowa, 476, 79 N. W. 280; Pub. Cl. House v. Coyne, 194 U. S. 497, 24 Sup. Ct. 789, 48 L. Ed. 1092; Weimer v. Bunbury, 30 Mich. 201; Spencer v. Merchant, *supra*; Yeomans v. Riddle, 84 Iowa 147, 50 N. W. 886; Wulzen v. Board, 101 Cal. 15, 35 Pac. 353, 40 Am. St. Rep. 17; Munson v. Commissioners, 43 La. Ann. 15, 8 South. 906; McMahon v. Palmer, 102 N. Y. 176, 6 N. E. 400, 55 Am. Rep. 796; Cooley's Const. Lim., p. 354, 355; McKeevers v. Jenks, 59 Iowa 300, 13 N. W. 295; Re Meder Irr. Dist., 92 Cal. 296, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106; Hagar v. Rec. Dist., 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569. The holding of the trial court comes well within the law of the cited cases, and must be upheld.

5. Some other questions are suggested as to the details to be observed in carrying the statute into effect. Among other things, it is said that the tax should not be levied until the work is actually done. We see

B. By Joining in Petition.

One who signs the petition for formation of a district cannot object to defective notice, or want of notice. Carr v. Boone, 108 Ind. 241, 9 N. E. 110 (1886).

C. By Joining in Remonstrance.

One who joins in a remonstrance against the proceedings cannot set up want of notice thereof. Sunier v. Miller, 105 Ind. 393, 4 N. E. 867 (1886); Ford v. Ford, 110 Ind. 89, 10 N. E. 648 (1887); Pittsburg C. C. & St. L. R. Co. v. Machler, 158 Ind. 159, 63 N. E. 210 (1902); Re Drainage Application, etc., 35 N. J. L. (6 Vr.) 511 (1872).

D. By Appearing and Contesting.

Notice is waived by appearance and participation in the proceedings. Ross v. Board of Supervisors Wright County, 128 Iowa 427, 104 N. W. 506 (1905), principal case; Gilkerson v. Scott, 76 Ill. 509; Sunier v. Miller, 105 Ind. 393, 4 N. E. 867 (1885); Undegraff v. Palmer, 107 Ind. 181, 6 N. E. 353 (1886); Ford v. Ford, 110 Ind. 89, 10 N. E. 648 (1886).

One who is served with notice and appears and contests assessments on the merits without making objection to sufficiency of notice or regularity in filing petition, waives all questions pertaining to the jurisdiction growing out of such matters. He cannot take advantage of failure to notify others, unless it appears such failure will prevent construction of the drain. Pittsburg C. C. & St. L. R. Co. v. Machler, 158 Ind. 159, 63 N. E. 210 (1902)).

no reasonable ground for the objection. Certainly the statute seems to authorize the proceeding taken by the supervisors. When the contract is let, the amount for which the drainage district is to be made liable is approximately ascertained, and it is the dictate of business prudence that the board proceed at once to provide for the means with which to discharge the debt. Our attention is called to no precedent or rule of law in support of the proposition stated by counsel, and we think the objection must be overruled. If, as claimed, the board failed to fix the proportion of the tax to be paid yearly, we have to say that the petition in this action was filed September 21, 1904, interrupting the proceedings by the board before any assessment was made, and that the order distributing payment over a series of years pertains to a matter of detail which we may presume the supervisors will properly attend to when the termination of this litigation leaves them free to go on with the matter.

Other points made in argument are merely incidental to or are governed by those which we have already considered at length, and do not require further discussion.

The conclusion reached by the district court is correct, and the decree appealed from is affirmed.

One appearing before supervisors in proceedings for establishment of a drain, and making no objection thereto, is barred from objecting to the notice of the formation of the district on appeal from an order levying assessment. In re Lightner, 145 Iowa 95, 123 N. W. 749 (1910).

E. Special Appearance.

Waiver of notice is not made by one who appears specially to object to want of notice. Carr v. Boone, 108 Ind. 241, 9 N. E. 110 (1886). But it is if he takes part in the general proceedings. Gilbert v. Hall, 115 Ind. 549, 18 N. E. 28 (1888).

As to waiver of irregularities in drainage proceedings, see note II to Smith v. Claussen Park Drainage & Levee District, p. ——, vol. 2, this series.

XIV. Knowledge Not Sufficient.

Where commissioners have not acquired jurisdiction, a landowner is not estopped by knowledge of the work. Rice v. Wellman, 5 Ohio Cir. Ct. Rep. 334 (1891).

It is not enough that the owners chance to have notice or that they may as a matter of favor have a hearing. The law must require notice to them and give them a right to a hearing, and the opportunity of being heard. Beebe v. Magoun, 122 Iowa 94, 97 N. W. 986, 101 Am. St. Rep. 259 (1904); Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289 (1878).

J. M. GUFFEY PETROLEUM CO. v. MURREL, Tax Collector, et al.

[Supreme Court of Louisiana, November 14, 1910; on application for rehearing December 12, 1910.]

— La. —, 53 So. 704.

1. Mine—Definition of Word.

A mine is defined as a large opening in the ground made for the purpose of getting metal ores or coal.

2. Oil Well—Not a Mine.

An oil well is not a mine and operation of a well is not a mining operation within article 230 of the Louisiana Constitution exempting property so used from certain classes of taxes.

3. Oil Not a Mineral.

Mineral oil is not classed as a mineral within the meaning of the Louisiana Constitution.

4. Oil Company—Assessment.

The J. M. Guffey Petroleum Company is sufficiently described for the purpose of a valid assessment by the name "Guffey Oil Company."

5. Taxation—Exemptions Strictly Construed.

Exemptions from taxation are strictly construed and doubt as to the legislative intent destroys the claim of immunity.

Appeal from Eighteenth Judicial District Court, Parish of Acadia; Wm. Campbell, Judge.

Action by the J. M. Guffey Petroleum Company against J. L. Murrel and others, to enjoin a sale for taxes. Judgment for plaintiff. Defendants appeal.

Reversed.

For appellants—J. L. Dormon and Lewis & Lewis.

For appellees—Story & Pugh and Carlton & Townes.

Statement of the Case.

NICHOLLS, J. The plaintiff, a corporation organized under the laws of Texas and domiciled in the city of Beaumont in that state, alleged: That long prior to the acquisition of the lands and properties described in its petition, and long prior to the 1st of January, 1907, it had filed

NOTE.

On petroleum and natural gas as minerals, see note to Whiting v. Stroup, p. ——, vol. 2, this series.

with the Secretary of State of Louisiana a declaration of the place of locality of its domicile, together with the name of its agent or officer in the said state of Louisiana, representing said corporation, upon whom services of process could be made, and had in all things complied with the Constitution and laws of the state of Louisiana, and that it was, on the 1st day of January, 1907, and at all times thereafterwards, duly authorized to do business in the state of Louisiana, and especially to do the business the nature and character of which is hereafter disclosed.

That on the said 1st day of January, 1907, in conjunction with one T. H. Bass, it was the owner and was in possession of the land and property and property rights and privileges hereafter set out; it, the said plaintiff, owning an undivided one-half interest therein, and the said T. H. Bass owning the other undivided one-half interest therein. That said property was situated in the parish of Acadia, state of Louisiana, and being described as follows, to wit: All the rights, privileges, and immunities of the lessee in a certain oil or mineral lease executed on the 23d day of March, 1903, by the Jennings-Heywood Oil Syndicate to George Harrison Morse, Fred F. Morse, Charles Stoddard Morse, George A. Morse, and Avery C. Wilkins, said lease being concurred in by one L. Arnoudet, same the following described property, to wit:

Situated in the northwest corner of section 47, township 9 south, range 2 west La. Mer. Beginning at the northwest corner of section 47; and running thence approximately south along the line of said section 47, 417.42 feet; thence running approximately east on a line parallel with the north line of said section 47, 216.42 feet; thence running approximately north on a line parallel with the west line of said section 47 to the north line of said section; thence running approximately west with the north line of said section 47 to the place of beginning. Which lease is duly recorded in the conveyance records of the parish of Acadia, La., and said instrument is hereby referred to; this lease or instrument giving the right to the lessee to develop the said land and produce petroleum oil therefrom upon the payment of a fixed royalty therein provided.

Also, the rights of lessee granted and given by a certain oil or mineral lease hereinafter described covering the following described tract of land, to wit:

Beginning at the northeast corner of the two acres just above described, which said beginning point in the north line of section 47, 216.72 feet east from the northwest corner of said section; thence approximately south parallel with said section 47 and along the east line of said two-acre tract a distance of 417.42 feet; thence east parallel with the north line of said section a distance of 54.18 feet; thence approximately north parallel with the west line of said section a distance of 417.42 feet to the north

line of said section; thence west a distance of 54.18 feet to the place of beginning. Said one-half acre of ground being described in a mineral lease executed by the Ladies Oil Company, Limited, to George A. Morse of date January 2, 1905, passed before Charles R. Kline, notary public, duly recorded in the records of conveyances of the parish of Acadia, state of Louisiana; and also described in a certain lease and mineral contract executed by the Bienville Oil Company to the Morse Oil Company of date April 20, 1905, passed before Charles R. Kline, notary public, to which said instrument and the records thereof reference is hereby made, the interests of the lessees being shown by said leases above described, which oil or mineral leases were in the usual form and conveyed to the lessee therein a right to develop the land and produce oil therefrom upon the payment of the royalty therein provided.

Also, all the right, title, and interest as lessee in and to a certain three acres of land described as one-acre tracts as follows: First tract: Starting at a point in the section line between sections 46 and 47, township 9 south, range 2 west La. Mer., 417.42 feet from the northwest corner of section 47, running in a southerly direction on and along said section line a distance of 208.71 feet to corner; thence in an easterly direction on a line parallel to the north line of said section 47, 216.72 feet, to corner; thence in a northerly direction on a line parallel to the west line of said section 47, 208.71 feet, to corner; thence in westerly direction in a line parallel to the north line of said section 47, 216.72 feet, to corner and place of beginning, containing one acre of land. Second tract: Starting at a point in the north line of section 47, township 9 south, range 2 west La. Mer., 325.8 feet east from the northwest corner of said section 47; thence in southerly direction in a line parallel to the west line of said section 47, a distance of 417.42 feet, to corner; thence in an easterly direction on a line parallel to the north line of said section 47, a distance of 108.36 feet, to corner; thence in a northerly direction in a line parallel to the west line of said section 47, a distance of 417.42 feet, to corner in north line of said section 47; thence in a westerly direction with the north line of section 47, a distance of 108.36 feet, to corner and place of beginning, containing one acre of land. Third tract: Beginning at a point in the north line of section 47, township 9 south, range 2 west La. Mer., 433.44 feet in an easterly direction from the northwest corner of said section 47; thence in a southerly direction in a line parallel with the west line of said section 47, 417.42 feet, to corner; thence in an easterly direction on a line parallel with the north line of section 47, 108.36 feet, to corner; thence in a northerly direction on a line parallel to the west line of said section 47, a distance of 417.42 feet, to corner; thence in a westerly direction with the north

line of said section 47, a distance of 108.36 feet, to corner and place of beginning, containing one acre of land.

The rights of the lessee in said three acres of land are shown by a contract in the nature of a lease made between the Jennings-Heywood Oil Syndicate and the Morse Oil Company on the 29th day of April, 1904, acknowledged on said date before J. H. Heinen, notary public, in which said contract the lessee was given the right to develop said land and produce oil therefrom on the payment of a certain royalty fixed in said contract. All the rights granted to the Morse Oil Company (which have since been acquired by the plaintiff herein) in and by virtue of a contract executed on December 14, 1905, by W. H. Lovegrove to the Morse Oil Company, whereby the Morse Oil Company, in consideration of the payment of $1,000 to said Lovegrove, obtained certain rights in and to the 100 feet square in acre 15 in the Arnoudet tract in the Mamou or Jennings oil field in Acadia parish, La., obtained by Lovegrove and McIntosh from the West Virginia Oil Company, the rights in which were acquired by the said Lovegrove from the partnership of Lovegrove & McIntosh under which contract made with Lovegrove the Morse Oil Company secured the right to operate for oil and gas upon said tract of land as is shown by the said contract, which is hereby referred to. The land covered by the contract so executed by Lovegrove to the Morse Oil Company is the same land leased to Lovegrove & McIntosh by the West Virginia Oil Company on the 25th day of January, 1905, and is a tract 100 feet by 100 feet out of acre 15 of the Arnoudet tract in the Mamou or Jennings oil field in Acadia parish, La., which lease is referred to. The rights of the said Morse Oil Company (which have been acquired by plaintiff herein) was the right to develop said land and produce petroleum oil therefrom.

Also, all the rights of lessee granted by a certain oil or mineral lease executed by the Jennings-Heywood Oil Syndicate to the Morse Oil Company concurred in and ratified by Jules Clement and the Lyons Oil Corporation passed on before J. H. Heinen, notary public, October 15, 1903, and covering the following described tract of land:

Beginning at stake in the south line of block 14 of the Jules Clement tract of land in fractional section 46, township 9 south, range 2 west La. Mer., as shown by a plat of subdivision in full in the clerk's office of said Acadia parish, and marked "plat showing subdivisions into acres and fractions of blocks in fractional section 46, township 9 south, range 2 west La. Mer., a part of holdings of Jennings-Heywood Oil Syndicate, surveyed and certified by J. F. Harvey and W. H. Garrot, said stake being situated 20 feet to the eastward of the southwest corner of block 14"; thence southward 321.47 feet in a line parallel to the west line of

fractional section 46 and 20 feet distant from said line to stake for corner; thence eastward on a line parallel to the south line of block 14, 135.05 feet, to a stake for corner; thence northward 321.47 feet on a line parallel with the west line of fractional section 46; thence westward and along the south line of block 14, 135.05 feet, to stake for corner and place of beginning, containing one acre of land, together with all buildings and improvements thereon. Which conveyance is duly recorded in the records of conveyances of the parish of Acadia, La., and is hereby referred to.

Which said right of said lessee, as created by said contract, was the right to develop said land and produce petroleum oil therefrom upon payment of certain royalties provided in said instrument. Also, three certain earthen storage tanks situated in the southeast corner of the northeast one-fourth and in the northeast corner of the southeast one-fourth of section 42, township 9 south, range 2 west La. Mer. The said earthen storage tanks are located on land not owned by the plaintiff herein nor by the grantors of plaintiff herein, but the right claimed by the plaintiff herein is the right to the use of said earthen storage tanks for the accommodation of petroleum oil produced from the land above described.

Also, certain personal property connected with and in active use of the business of developing and marketing oil from the land described, consisting of rotary drilling rigs, cable drilling rigs, pumping rigs, pumping engines, pipe, tubing, boilers, wooden and steel tanks, and various and sundry other articles of machinery and merchandise used in connection with the business of developing said land and producing and handling petroleum oil therefrom.

That on or about the month of June, 1907, the said plaintiff herein, the J. M. Guffey Petroleum Company, purchased from T. H. Bass all of his interest in the property and property rights of whatever nature or kind hereinbefore described. That on or before the 1st day of June, 1907, and up to the time that the plaintiff herein bought the interest owned by the said Bass in the said property, this plaintiff, together with the said Bass, appeared to be the owners of the said property upon the books of the recorder's office in the parish of Acadia, State of Louisiana, and that, after the purchase made by this plaintiff from the said Bass, it (the plaintiff) appeared to be the sole owner of the said property on the books of the recorder's office of said parish.

That, from time to time during the year 1907, the said J. M. Guffey Petroleum Company placed certain property in the way of machinery and appliances on the land necessary to be used in the conduct of its business of producing oil from said land and marketing and handling same. That, during the time the said Bass was a conjoint owner with this

plaintiff in the said property, the whole of the said property was used by it in the production, handling, and marketing of petroleum oil therefrom, and, since said purchase from the said Bass, the whole of the property above described has been used by this plaintiff in the production, handling, and marketing of petroleum oil therefrom.

That on the 1st day of January, 1907, and at all times thereafterwards, it and the said Bass (from whom it acquired an interest in the property) were using said property solely in the production, handling, and marketing of petroleum therefrom, and the said land, and each and every article of personal property connected therewith, were used and were necessary to be used in the production, handling, and marketing of petroleum oil therefrom, and that its business and the said business of the said Bass, so conducted in respect to said property during the whole of said time, was a mining operation within the terms of the Constitution of the State of Louisiana, and all of said land, and all of said personal property connected therewith, and all of the rights therein exercised or in any way used by this plaintiff in connection with said Bass during the said time in question, that is, on January 1, 1907, and at all times thereafterwards, was a mining operation, and the same represented and was capital, machinery and other property employed in mining operations within the terms and meaning of the Constitution of the State of Louisiana. That the sole use for which the said property is and has been held during the said period of time was to produce petroleum oil therefrom. That the said plaintiff and the said T. H. Bass during the time he was a part owner therein were in respect to said land, engaged in the business of producing oil from oil wells located on said land, and in the sinking of additional wells thereon, and in producing oil therefrom, and in the marketing, handling, and making available to themselves the oil produced therefrom. That the business that plaintiff was engaged in, the character of which is hereinabove discussed, is and was a mining operation. That the oil on hand at any time coming from the said land represented and was capital, machinery, and other property employed in mining operations, was the avails of its business, conducted as aforesaid, and it (the plaintiff) here alleges that the whole of the same was, under the Constitution of the State of Louisiana, exempt from parochial and municipal taxation for the year 1907. And said petitioner further represents that on the 1st day of January, 1907, and at all times thereafterwards, this petitioner for itself, during the time that it was the sole owner of the said property, and it together with the said Bass during the time that the said Bass was conjointly interested with it in the ownership of the said property, employed not less than five hands in the conduct and management of said business; this being necessary to the proper

conduct of its business, the character of which has been hereinbefore given.

That, notwithstanding such exemption under the Constitution, the assessor of the parish of Acadia, State of Louisiana, has attempted to assess for taxes for the year 1907 the said property above described and had attempted to assess against the said property certain parochial taxes, the exact amount and nature of which would hereinafter be given; the exact words of said assessment being as follows:

For the use and value of pipings, earthen, wooden and iron tanks in the Jennings oil field, tools, implements, oil well on Martin lands, also on lands of L. Arnoudet in section 47, township 9, range 2 west, including wells Nos. 1, 2, 6, and 12 on Martin I lease and wells Nos. 7 and 8 on R. E. Brooks lease and all wells on hand January 1st, and including all the property which were sold to T. J. Bass by the Morse Oil Company.

State Tax	$125 00
Parish Tax	125 00
Fourth Ward Road Tax	100 00
	$350 00

That, as a matter of fact, the assessment so made by the assessor purports to be against the Guffey Oil Company, and is, in no sense, a proper assessment against this plaintiff; but it is averred: That said attempted assessment is asserted and claimed by the officers representing the parish of Acadia to be a charge against the property of the plaintiff herein, a description of which has hereinbefore been given. That the gross valuation put upon said property by the assessor of the parish of Acadia, and the police jury of said parish, amounts to $25,000; this being given as the aggregate value of all of the hereinabove described property assessed in the terms hereinabove set out. Plaintiff shows: That the state tax attempted to be assessed against said property for the year 1907 amounts to $125. That certain interest and other costs claimed by the parish against this plaintiff and against other property amounts to $7.25, which said amount of state tax, as well, also, as said charges amounting to $132.75, this plaintiff had paid and here exhibits the receipt of the tax collector of Acadia parish, to wit, the sheriff of said parish, the defendant herein, showing the payment of $132.25, which said tax receipt was marked "Exhibit B." That, in addition to the said tax so paid by the plaintiff herein, the said parish, the police jury (whereof J. Kenneth Toler is president), and the said J. L. Murrel, defendants herein, were claiming a right to collect from this plaintiff $325 parochial tax under an ordinance levying a tax for general parochial purposes adopted November 13, 1907, and an ordinance levying a special four-mill tax for road purposes in the Fourth Ward of the parish, adopted August 27, 1907.

That notwithstanding said parochial tax, amounting to $325, was not assessable against the said plaintiff, the said defendant herein, J. L. Murrel, sheriff and tax collector of Acadia parish, had demanded, and was demanding, the payment thereof, and had notified petitioner that, should it fail to pay said taxes, he would proceed to advertise and sell said property and appropriate the proceeds of said sale to the payment of said illegal tax; said property being now ordered for sale for said pretended tax on 16th of January, 1908. That the said sheriff has procured to be delivered to this plaintiff a notice addressed to Guffey Oil Company "Beaumont, Tex.," advising that he will sell said property unless said tax be paid, a copy of which said notice is hereto attached, marked "Exhibit C," and made a part hereof and hereby referred to. That although the plaintiff has paid all of the taxes properly assessable against it, and although the said assessment against the said plaintiff and its said property on account of parochial taxes is null and void, and of no force and effect, the said defendant herein persists in his demand for the collection, and threatens to and will attempt to sell the said property of the plaintiff herein unless he be restrained from so doing. Plaintiff shows: That while the assessment, a copy of which appears hereinabove, does not accurately describe the property of this plaintiff, and while the assessment is not made against this plaintiff by name, it is shown and here averred to be fact that this plaintiff was intended to be designated under the appellation of the "Guffey Oil Company," and the property attempted to be described in said assessment is the property and no other than that owned and used by this plaintiff as hereinabove described, and the sale threatened to be made by the defendant herein is intended to be a sale of the said property so owned by the plaintiff and will or might, if permitted to be made, cover and include at least portions of the property actually owned by said plaintiff as hereinbefore set out.

That, in order to protect it and its property from such illegal seizure and sale, it was necessary that an injunction be issued, and that, unless said injunction was issued, the said sheriff would execute his threat and proceed to make said sale.

That it now here offers to make a bond in such terms and for such amount as the court may require, and it signifies its willingness to comply with any order legally made by this court in the premises.

In view of the premises, petitioner prays: That, a rule *nisi* issue herein to Joseph L. Murrel, sheriff of the parish of Acadia, and to the police jury of the parish of Acadia, represented by its president, J. Kenneth Toler, and to Alex Lormand, assessor of the parish of Acadia, as in law in such cases made and provided, to show cause if any they have, why a writ of injunction should not issue herein directed to the sheriff of the

parish of Acadia, and to the said police jury of the parish of Acadia, restraining, prohibiting, and enjoining them and each of them from selling, or attempting to offer for sale, the property of petitioner illegally assessed as aforesaid for the year 1907, for the parochial taxes, general and special. That, after due hearing on said rule, peremptory injunction issue herein so restraining, enjoining, and prohibiting said Jos. L. Murrel and the police jury of the parish of Acadia, from selling, or attempting to sell, or offering for sale, the property of petitioner, for the taxes illegally levied upon the assessment of petitioner's property as appears on the assessment rolls for the taxes for the year 1907, parochial, general, and special, as aforesaid.

That Jos. L. Murrel, the said police jury of the parish of Acadia, through its president, J. Kenneth Toler, and A. C. Lormand, assessor of the parish of Acadia, be cited to answer hereto, and, after due hearing that the assessment and taxes against petitioner's property for parochial taxes, general and special, be declared null and void; same being exempt from taxation for parochial purposes under the Constitution of the State of Louisiana. That said A. C. Lormand and the said police jury be directed to strike out the assessment of the property of petitioner on the assessment rolls as made by said assessor and approved by the police jury of the parish of Acadia, acting as a board of review, in so far as said assessment attempts to fix a charge against petitioner or its property, the parochial taxes, general and special, and has been illegally assessed and the parochial taxes levied thereon by the police jury for the parochial taxes for the year 1907, are null and void, and that petitioner's property be declared to be relieved from the payment of said parochial taxes.

Petitioner further prayed that said writ of injunction be maintained and perpetuated, and prayed for general and equitable relief in the premises.

On reading the petition, the district court ordered that a rule *nisi* issue directed to the sheriff of the parish of Acadia, *ex officio* tax collector, the police jury of the parish of Acadia, and the assessor of said parish, to show cause, if any they had, why a writ of injunction should not issue and the relief prayed for be not granted as prayed for.

On trial of the rule a preliminary writ of injunction was ordered to issue, and was accordingly issued.

The defendants thereafter answered. After pleading a general denial, they admitted that the taxes sought to be annulled were duly and legally assessed against the property of the plaintiff set out in its petition, and that the sheriff and *ex officio* tax collector was proceeding according to law to enforce the payment of said taxes when the writ of injunction

issued herein. Defendants specially denied that petroleum oil was a mineral either in the common acceptation of the term or in a scientific sense or in the sense contemplated by the Constitution, and they specially denied that prospecting for same is in any sense a mining operation.

Defendants averred: That whatever, if any, prospecting for or obtaining of petroleum oil was done or performed by the plaintiff in Acadia parish by or with the aid of or upon any of the property set out in its petition, was done and performed simply and solely by drilling small holes, less than 12 inches in diameter, into the ground, and no pits nor excavations nor mines have been by the plaintiff opened or operated in Acadia parish, and such operations as it had conducted were not mining operations in the common acceptation of the term, nor in a technical sense, nor within the intendment and meaning of the Constitution of the State of Louisiana, and none of the property set out in plaintiff's petition was exempt from taxation.

That none of the property enumerated in plaintiff's petition was exempt from the payment of the special road tax for the further and additional reason that the said tax was duly and legally voted by the taxpayers of the road district in which the property was located long after the adoption of the Constitution of 1898.

In view of the premises, defendants prayed that the exceptions filed by them in answer to the rule *nisi* be maintained and plaintiff's suit be dismissed and injunction dissolved and for ten per cent. attorneys' fees as allowed by law, and, if the said exceptions be not maintained, then upon trial of the merits that the demands of the plaintiff be denied and rejected, and that the writ of injunction issued herein be dissolved, and that the defendants have judgment against the plaintiff and the surety on its injunction bond *in solido* as provided by law for attorneys' fees at the rate of ten per centum per annum on the amount of the taxes of which the payment was enjoined with interest, penalties, and cost added thereto, and for cost and all necessary orders and decrees, and for general relief.

The district court rendered judgment ordering, adjudging, and decreeing that the writ of injunction which had issued in the case be maintained and perpetuated, and that the sheriff of the parish of Acadia, and the police jury of the aforesaid parish, be forever restrained, prohibited, and enjoined from selling, or attempting to offer for sale, the property described in plaintiff's petition herein for general and special parochial taxes levied on the property of the plaintiffs as is assessed on the assessment rolls of the parish of Acadia for the year 1907.

It further ordered, adjudged, and decreed that the assessment and taxes against the property of the plaintiff referred to in this petition were

null and void, and that the said property was exempt from taxation, special and general, for parochial purposes under the Constitution of the State of Louisiana for the year 1898. The assessor of the parish of Acadia and the police jury of said parish, through its president or its proper officers, were commanded and directed to strike out the assessment on the property of the plaintiff, J. M. Guffey Petroleum Company, from the assessment rolls as made by the assessor of the parish of Acadia, and of the police jury of the said parish, acting as a board of review in so far as said assessment attempted to fix a charge against the said J. M. Guffey Petroleum Company and a lien on its property for parochial taxes, either general or special, or both.

It further ordered, adjudged, and decreed that the taxes levied by the police jury of the parish of Acadia, both general and special, for the year 1907, be, and they are hereby, decreed null and void; that the property of the plaintiff be relieved from the payment of the said parochial taxes general and special, as aforesaid.

It further ordered, adjudged, and decreed that the costs of this suit be paid by the defendants.

Defendants have appealed.

Opinion.

Defendants in injunction in their brief maintain that at the time it is a matter of history, when the Constitution of 1898 was framed, there were no oil wells in the State of Louisiana, no profitable deposits of oil were known to exist within the state, and we believe we are safe in saying that few or none of our citizens ever dreamed of the possibility of Louisiana becoming a producer of petroleum oil in profitable quantities. Hence, it seems to us, a conclusive presumption that not one of the framers of our Constitution had in mind any such thing as oil or the drilling of oil wells when article 230 was written.

This being the case, the only possible way by which the plaintiff can obtain the exemption under the language used is to show conclusively that the drilling of oil wells and the handling of the product therefrom is a "mining operation," not only in a technical or scientific sense, but also within the common acceptation of the term.

"The words of a law are generally to be understood in their usual signification, without attending so much to the niceties of grammar rules as to the general and popular use of the words." Civ. Code, art. 14.

Let us then see what is really a "mine" and a "mining operation" as "understood in their most usual signification," as shown by respectable authorities. The Century Dictionary defines a "mine" to be:

"An excavation in the earth made for the purpose of getting metal ores, or coal. Mine work in metal mines consists in sinking shafts and winzes,

running levels and stoping out the contents of the mines thus made ready for removal. In coal mining the operations differ in detail from those carried on in connection with metal mines, but are the same in principle. The details vary in coal mining with the position and thickness of the beds. A mine differs from a quarry in that the latter is usually open to the day, but in any mine a part of the excavation may be open work (see that word) as in running an adit level which may be carried a considerable distance before coming covered by earth or rock. When the term mine is used, it is generally understood that the excavation so named is in actual course of exploitation, otherwise some qualifying term like abandoned is required. No occurrence of ore is designated as a mine unless something has been done to develop it by actual mining operations. There are certain excavations which are termed neither mines nor quarries, as, for instance, places where clay is being dug out for brick; such places are frequently (especially in England) called pits and also open works. With a few and not easily specified exceptions a quarry is a place where building stone or building material of any kind (as lime, cement, etc.) are being got; a mine where some metal or metalliferous ore is in the process of exploitation. * * *"

The same authority defines "ore" as:

"A metalliferous mineral or rock, especially one which is of sufficient value to be mined."

It will be noted that in defining, the word "excavation," usually made use of in describing some large kind of opening, is employed. It will also be noted that only three objects are designated as being those for which a mine is opened, that is, metal, ores, or coal. It will further be noted that throughout the definition the words "quarry" and "pits" both also signifying large openings in the earth, are employed as almost synonymous with the word "mine," and it is shown from the language used that the three terms are extremely similar, so much so that considerable trouble is taken to explain the slight difference between the three terms. A reading of the entire definition fixes indelibly upon the mind the idea that a "mine" is: First, a large opening into the ground like a pit or quarry; second, that only such openings are mines as are made for the purpose of getting metal, ores, or coal. We submit that the definition above quoted is an absolutely faithful and accurate statement of what constitutes a "mine" in the most usual signification of the word. There is nothing whatever in this definition which would even remotely suggest that a small opening less than 12 inches in diameter drilled into the ground for getting out oil could possibly be termed a "mine." It is shown in the evidence that the plaintiff's wells were of this character. The word "mine" ordinarily conveys to the intelligence the idea of a large opening into the ground into which men descend for the purpose of getting metal, ores, or coal, and large enough to accommodate such operations. This is the ordinary meaning of the word and

the sense in which it is employed in the Constitution. Now, if an oil well be not a mine—and it most assuredly is not—then the drilling or operation of such a well could not possibly be termed a "mining operation." A productive oil well or aggregation of them is always universally and invariably known as an "oil field." Who ever heard of such being called a "mine"? If an oil well was a "mine" in the usual signification of the word, surely some time, somewhere, some intelligent person would be heard to designate it by that term; but it is never done. Now a "mining operation" must certainly be something having to do with a mine, and, if an oil well is never known in the ordinary and customary use of language as a "mine," then neither the making nor operating of one would possibly be considered a mining operation in the ordinary signification of the word. He who works in a mine is termed a "miner"; but no one ever heard of a laborer at an oil well being called a "miner." It is shown by the testimony that an oil well is too small for a man to get into, even if such was necessary or desirable, which it is not. We think it absolutely clear that the words "mine," or "mining operation," never refer to oil wells or oil production in ordinary parlance. But, even if there should be any doubt upon that point, it must be resolved against the plaintiff, because they are claiming an exemption under the Constitution, and it must be construed strictly, and unless they show themselves clearly entitled to this exemption, they must lose. It seems to us self-evident that the intention of the Constitutional Convention in framing article 230 was to hold out to capital an inducement to open and work mines in the state, not for the sake of having them opened, but to give employment to thousands of laborers who would become a permanent addition to our population and who would be home builders and an incalculable benefit to the state. It is evident that they had in contemplation mines in the true sense of the word; that is, mines of coal, iron ore, and such, which are, to a large extent permanent in their nature, and which would afford directly employment to large numbers of people. They did not have in mind oil wells and oil fields, which are temporary and evanescent in their nature; there is nothing permanent about them. It is evident that, if they had actually had oil fields in mind in framing the provisions of article 230, such would not have been brought within the exemption for the simple reason they afford employment to comparatively very few; they are but little benefit to the state. The owners resist every raise made in the assessment of their property, and, if that does not avail, they seek to cloak themselves with article 230. The business is of such temporary character that by the time an increase can be made in the assessment the property has begun to wane in value.

Notwithstanding the enormous quantities of oil produced at the oil field in question, not enough population has been gathered there to make even an incorporated village; there are no works of permanent improvement found there; and, since the production has greatly decreased, it is a dreary place, and in a few more years will be a worthless one. Contrast this locality with Birmingham, Pittsburg, and places where there are mines in the proper and usual meaning of the term. It is shown in the testimony that, although the plaintiff's production of oil was at times as high as 29,000 barrels per month, they actually failed to prove that as many as five hands were continuously employed by them. And this brings us to the consideration of another point in the case.

BREAUX, C. J. Our associate, Justice Nicholls, prepared the foregoing opinion. As he is unable to be present, he sent it to us from his room of illness and suffering, for consideration.

It was adopted by all the members of the court.

In the last sentence reference is made to another point, and the writer stopped.

We are decidedly of the opinion that the "Guffey Petroleum Company" is not engaged in mining operations, and that the operations do not come within the terms of the article of the Constitution exempting such operations from taxation.

Boring for oil is not a "mining operation." Nor is the gushing process nor the pumping up of oil "mining."

"Mining" has been defined as a process by which useful minerals are extracted from the earth. This does not include the process whereby petroleum oil is obtained—not a mineral within the intendment of the cited article of the Constitution.

Further, in regard to mining, it may be said that the art of mining consists of processes whereby ores or other minerals are obtained from the earth—minerals known as solids. They existed in the early dates in liquid or gaseous state—but now they are solids.

Mineral waters are not classed as minerals; in fact, no absolute line of demarcation can be drawn between ordinary and mineral water.

Nor is mineral oil a mineral within the intendment of the article of the Constitution invoked by plaintiff. Oil does not have the physical properties of minerals which can be extracted by mining.

Beyond general expressions upon the subject, we have not found a single decision in which it was decided that the process of obtaining petroleum oil from the earth is a mining operation.

Has the J. M. Guffey Petroleum Company not been properly assessed, is the question presenting the next issue for decision. In our opinion the assessment is now valid.

It was assessed as the Guffey Oil Company. Being the same company (the Guffey Petroleum and the Guffey Oil Company), the decisions which hold that property must be assessed in the name of the record owner are not in point. They are cited by plaintiff. They do not support the company's contention. Here the only question is whether there was error in the name of the owner to the extent that it vitiated an assesment. We conclude the record owner is the J. M. Guffey Petroleum Company.

It is sufficiently described by the name of "Guffey Oil Company."

Since the year 1907, the assessment has been made in the name of the Guffey Oil Company. No complaint has been made before this suit was brought. It is too late now to complain of the insufficiency of the name. The plaintiff knew of this assessment—doubtless paid other taxes in that name.

The testimony does not show that plaintiff employed a number of men over five. There may be proof of the employment of that number. If there is, it has not been found.

It may be lurking somewhere on one of the pages of the voluminous record. The employment of five hands is essential to exemption.

Having arrived at the conclusion that the plaintiff is not exempt, that relieves us from the necessity of deciding other points than those decided.

For reasons assigned, it is ordered, adjudged, and decreed that the judgment appealed from is avoided, annulled, and reversed at the costs of plaintiff in injunction in both courts. The injunction is dissolved.

It is further ordered, adjudged, and decreed that the property assessed is subject to taxation, and that its owners owe the amount of the claim made by defendant in injunction.

On Application for Rehearing.

LAND, J. We may concede the contention of the learned counsel for the plaintiff that, scientifically speaking, petroleum is a "mineral," and that its extraction from the bowels of the earth is a "mining operation." But petroleum is a substance of a peculiar character, and differs in many respects from coal and other minerals which have a fixed situs. Petroleum also requires an entirely different process of mining, so called. As late as 1897 it was deemed necessary to pass an act of congress to class petroleum as a mineral in the sense of the mining laws of the United States. Act Feb. 11, 1897, c. 216, 29 Stat. 526; section 2333, Rev. St. (U. S. Comp. St. 1901, p. 1434).

In 1898 no oil or gas wells existed in the state of Louisiana, and it was not until 1910 that oil and gas were classed with "other minerals." Acts

Nos. 172 and 196 of 1910. The Civil Code refers to "mines and quarries" as worked or opened, and not opened, and as the subjects of usufruct and of lease. Articles 552, 2738.

The term "mining operations," as used in the Constitution of 1898, if taken in its most general sense, may be construed to include all operations to obtain anything from the earth which is not animal or vegetable, such as water, gases, and mineral oils.

But in its ordinary acceptation the verb "mine" means to "dig" in the earth to get ore, metals, coal, or precious stones, and the noun "mine" means a pit or excavation in the earth, from which metallic ores, precious stones, or other mineral substances are taken by digging; distinguished from the pits from which stones for architectural purposes are taken, and which are called "quarries." Webster's International Dictionary, verb. The question before us is whether the term "mining operations" was used by the framers of the Constitution of 1898 as a most general classification of things, or in its most usual signification. One of the canons for the construction of laws is thus expressed in Civ. Code, art. 14:

"The words of a law are generally to be understood in their most usual signification, without attending so much to the niceties of grammar rules as to the general and popular use of the words."

The same canon is also expressed in article 1946 of the Civil Code:

"The words of a contract are to be understood, like those of a law, in the common and usual signification, without attending so much to grammatical rules, as to general and popular use."

Another rule of construction is that exemptions from taxation are strictly construed, and doubt as to the legislative intent is fatal to the claim of immunity.

The claim of exemption urged by the plaintiff is at least doubtful, and for that reason must be denied.

Rehearing refused.

BELLEVUE GAS & OIL CO. v. PENNELL.

[Supreme Court of Kansas, December 7, 1907.]

76 Kan. 785, 92 Pac. 1101.

1. Gas Lease—Construction of.

In construing an oil and gas lease, the whole instrument, the situation of the parties, and the subject-matter of the contract will be considered together.

2. Same—Provision to Pipe to House.

A provision in a lease "to pipe gas to the house for domestic purposes as soon as well is completed" construed to mean without charge for the gas.

CASE NOTE.

Peculiar Rules of Construction Applied to Gas and Oil Leases.

I. Oil and Gas Leases in Separate Class.

The peculiar wandering character of gas and oil precludes ownership in their natural state, and hence they are not the subjects of sale and conveyance until they have been reduced to possession and placed under control by being diverted from their natural pass into artificial receptacles. In gas and oil leases the real subject of the contract is the mining of the gas or oil that may be found, on the terms specified. The preliminary exploring is a mere incident that goes for nothing if unsuccessful, and unless oil or gas is found in paying quantities there is not, and was not at the inception of the contract, anything to which it could attach, so the title under such contract is at least inchoate until the result of the drilling is ascertained, and if barren territory is developed, then there is no lease, no continuing contract, no conveyance of title, because there is nothing to pass under the agreement. Added to this peculiarity is the custom of making such contract clearly in advance of the demand for the product. The impracticability of drilling until lines of transportation approach within reasonable reach, the delays in the beginning of operations secured by the payment of a small sum called rent, sometimes justifiable and sometimes unreasonable and merely for

On August 13, 1903, the defendant in error executed and delivered a gas lease to S. Breckenridge, which was subsequently assigned to and is now the property of the plaintiff in error. It reads: "Lease for Oil and Gas. This agreement, made this 13th day of August, 1903, by and between S. W. Pennell of Chautauqua County, Kansas, of the first part, and S. Breckenridge of Santa Paula of Ventura County, State of California, of the second part, witnesseth: That for and in consideration of the sum of one dollar, the receipt of which is hereby acknowledged, and

speculative purposes, the possibility and occasional practice of extracting the fluids from under other lands through wells on the premises of another, the uncertainty of the discovery, the large profits sometimes realized, the heavy expense of drilling the test well, the total loss of labor and expense in case of failure,—these and other like considerations have led courts to place oil and gas contracts, on account of the known characteristics of the business, in a class of their own. Such contracts are not ordinary leases or within the purview of a statute concerning the relation of landlord and tenant. New American Oil & Min. Co. v. Troyer, 166 Ind. 402, 77 N. E. 739 (1906).

Although a gas and oil lease contains provision for royalty or the payment of a small annual rental, the true consideration is the development of the property, and the primary and essential condition to any extension after the lapse of the time named is the finding of oil or gas in paying quantities within that time, and the secondary consideration that the rent reserved for the oil or gas found should be paid in conformity with the covenants in relation thereto, and the lessee will not be permitted to, upon making the small annual payments, hold the property beyond the time specified. Indiana Natural Gas & Oil Co. v. Granger, 32 Ind. App. 559, 70 N. E. 395 (1904).

The ordinary oil lease, whereby one grants to another gas and oil under certain land, with the right to enter thereon and operate for the oil, providing for the drilling of wells or the payment of rent and the rendering of royalty, etc., is not a lease as the word "lease" is usually interpreted. It is a covenant by the owner of land to another person whereby the latter has the exclusive right to enter upon and explore the land for gas and oil and prosecute such business, occupying only such portion necessarily required for that purpose. It has been said that gas and oil contracts belong to a class of their own and that courts will "look critically into such instruments for the real intention of the parties, because it so frequently happens that they cannot be enforced according to the strict letter of the contract." While it is true that the provisions in this class of contract as a rule are ambiguous, indefinite, and uncertain, it is also true that the parties are to be limited to the contract actually made, and for the purpose of ascertaining the true meaning of the language employed courts will look to the nature of the instrument and the conditions under which it was made, the situation of the parties, the nature of their business and the interest to be protected, not for the purpose of applying it, but for the purpose of effectuating their intention. Stahl v. Illinois Oil Co. (Ind. App.), 90 N. E. 632 (1910).

Gas and oil leases are in a class by themselves. They are not strictly leases, as defined and treated in the law of landlord and tenant. They are in the nature of written licenses, with a conditional grant conveying the grantor's

of the rents and royalties hereinafter specified, the party of the first part has and does grant and lease to the party of the second part the exclusive right of searching for and producing petroleum and natural gas, with the right necessary to do these things, and the right to assign, sublet, and subdivide a certain tract or parcel of land situate in Belleville Township, Chautauqua County, State of Kansas, bounded and described as follows: On the north by section line between 8 and 17; on the east

interest in the gas or oil well conditioned that gas or oil is found in paying quantities. Dickey v. Coffeyville Vitrified B. & T. Co., 69 Kan. 106, 76 Pac. 398 (1904).

Oil leases bear a well-understood character. The contemplated benefit to the lessor consists in royalties, and the provision for alternative rent is not one which the lessee may adopt and thereby relieve himself from drilling and operating, at his pleasure. Its purpose is to incite speedy development of the property and hence early payment of royalties. The lessee has the right to enter and explore, and to operate if oil or gas is discovered, but no estate in the land vests until mineral is found and worked. Until that time, the preliminary right is of such a character that it can be lost by abandonment without the lapse of time prescribed by the statute of limitations. Rawlings v. Armel, 70 Kan. 778, 79 Pac. 683 (1905).

An agreement giving the lessee the exclusive right to mine for and produce petroleum and natural gas from a certain tract of land and the possession of so much of said land as may be necessary therefor, is merely permission without consideration to occupy and use the premises for an indefinite time, and without the grant of a permanent interest in the land of any kind whatever. It is neither a lease nor an easement, but merely an oral license to occupy for a temporary purpose. Fowler v. Delaplain, 79 Ohio St. 279, 87 N. E. 260, 21 L. R. A. (N. S.) 100 (1909).

Gas is a mineral, and while in *situ* is part of the land, and therefore possession of the land is possession of the gas. But this deduction must be made with some qualifications. Gas, it is true, is a mineral, but it is a mineral with peculiar attributes which require the application of precedents arising out of ordinary mineral rights with much more careful consideration of the principles involved than the mere decisions. Water also is a mineral, but the decisions in ordinary cases of mining, etc., have never been held as unqualified precedents in regard to flowing or even to percolating waters. Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *ferae naturae*. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner. Their "fugitive and wandering existence within the limits of a particular tract is uncertain." Westmoreland & Cambria Natural Gas Co. v. De Witt, 130 Pa. St. 235, 18 Atl. 724, 5 L. R. A. 731 (1889).

The right of the lessee or grantee under an oil lease is to explore for and determine the existence of oil or gas under the land. If none is found, the rights of the grantee cease when the explorations are finished. If oil or gas is found in paying quantities, then the contract takes effect as an oil lease, and the lessee has a right and is under an obligation to operate the land for the production of oil during the time and upon the terms fixed by the lease. A vested title cannot ordinarily be lost by abandonment in a less time than that fixed by the statute of limitations

by lands of Mayfield and Lynn; on the south by lands of Mayfield Place; on the west by lands of Huff, also 20 acres S. ½, S. W. S. E. sec. 8, tp. 35, r. 12. To have and to hold the said premises for the term of two years from this date and so much longer as oil and gas can be produced in paying quantities or royalty is paid. The second party agrees: (1) To deliver to the first party in tanks or pipe lines the one-sixth part of all oil produced and saved on these premises; (2) If gas is found in paying quantities and utilized away from this farm to pay to party of the first

unless there is satisfactory proof of an intention to abandon. An oil lease stands on quite different ground. The title is for the purpose of exploration only, until oil is found. If it is not found, no estate vests in the lessee, and his title, whatever it is, ends when the unsuccessful search is abandoned. If oil is found, then the right to produce becomes a vested right, and the lessee will be protected in exercising it in accordance with the terms and conditions of his contract. Calhoon v. Neely, 201 Pa. St. 97, 21 Mor. Min. Rep. 754, 50 Atl. 967 (1902).

II. Distinguished from Ordinary Leases.

Mining and farming leases are dissimilar, and therefore the rules applicable to farming leases are not always applicable to leases of minerals. Gowan v. Christie, L. R. 2 H. L. (Sc.) 273, 5 Moak 114, 8 Mor. Min. Rep. 688 (1873).

A different rule of construction is applied to gas and oil leases from that applied to ordinary or to farming leases. The former, where a royalty is reserved, is not considered a grant of the property, but a right of possession for exploration and development and there is always a covenant, express or implied, for diligent search and operation. Huggins v. Daley, 99 Fed. 606, 20 Mor. Min. Rep. 377, 48 L. R. A. 320 (1900).

Where upon consideration of all the terms of a contract and its subject-matter and object, its manifest purpose is designated "the exclusive privilege for the purpose only of digging, mining, and preparing for shipment and shipping phosphate rock" on described lands of the specified quantity and quality contained in said lands, in return for which a royalty of seventy-five cents per ton is to be paid, such contract is not one for an ordinary or general use and occupation of the land, but the right given is special and precisely limited." Hiller v. Walter Ray & Co. (Fla.), 52 So. 623 (1910).

Oil leases or contracts stand on an entirely different basis from any other leasehold agreements. The work which is to be done is ordinarily experimental and speculative. If oil is not found, no estate vests in the lessee. Eaton v. Allegheny Gas Co., 122 N. Y. 416, 25 N. E. 981 (1890); Conkling v. Krandusky, 127 App. Div. 761, 112 N. Y. Supp. 13 (1908).

A different rule of construction obtains as to oil and gas leases from that applied to ordinary leases or to other mining leases, and owing to the peculiar nature of the mineral and the danger of loss to the owner from drainage by surrounding wells, such leases are construed most strongly against the lessee, and in favor of the lessor. Superior Oil & Gas Co. v. Mehlin (Okla.), 108 Pac. 545 (1910).

III. Distinguished from License.

An instrument conveying premises for a term, and so long as gas or oil are produced in paying quantities, is not strictly a lease, but a license coupled with a conditional grant. Herrington v.

part one hundred dollars per annum for the gas from each well so used; (3) To conduct operations so as to least interfere with farming privileges; (4) To drill no well within 600 feet of the buildings on these premises except by consent of the first party; (5) To complete one well every sixty days thereafter, until ten wells are completed on said lands, provided oil is found in paying quantities in each well so drilled; (6) To pipe gas to the house for domestic purposes as soon as well is completed. This block, of which this is a part, being the block of 266 acres in

Wood, 6 Ohio Cir. Ct. Rep. 326, 3 Ohio Cir. Dec. 475 (1892).

There is a distinction between a lease for the purposes of mining and a mere license to take mineral from the land. Where no estate is granted, it is a mere license, and there is no right in the licensee to the mineral until it has been separated from the ground and reduced to possession; but where a demise of land is made for a certain number of years at a fixed rent, for the purpose of mining, giving a right to erect buildings, etc., a leasehold estate is created. Barnsdall v. Bradford Gas Co., 225 Pa. St. 338, 74 Atl. 207 (1909).

IV. Construed Liberally.

Interpretation of lease should be liberal, not narrow and technical, so as to gather from the whole instrument the true intent of the parties. Mickle & Co. v. Douglas, 75 Iowa 78, 17 Mor. Min. Rep. 137, 39 N. W. 198 (1888); Harlow v. The Lake Superior Iron Co., 36 Mich. 105, 9 Mor. Min. Rep. 47 (1877); Bettman v. Harness, 42 W. Va. 433, 18 Mor. Min. Rep. 500, 26 S. E. 271, 36 L. R. A. 566 (1896).

Owing to its peculiar nature an oil or gas lease is construed most strongly against the lessee and in favor of the lessor. Superior Oil & Gas Co. v. Mehlin (Okla.), 108 Pac. 945 (1910).

V. Construed with Reference to Circumstances, Parties, and Subject-Matter.

It is well understood among oil operators that the fluid (gas or oil) is found deposited in a porous sand rock, at a distance ranging from five hundred to three thousand feet below the surface. This rock is saturated throughout its extent with oil, and when the hard stratum overlying is pierced by the drill, the oil and gas find vent, and are forced by the pressure to which they are subjected into and through the well to the surface. After this pressure is relieved by the overflow, the wells become less active, the movement of the oil in the sand rock grows sluggish, and it becomes necessary to pump the wells to quicken the movement of the oil from the surrounding rock, and lift it from the chamber at the bottom of the well to the surface. An oil or gas well may thus draw its product from an indefinite distance and in time exhaust a large space. Exact knowledge on this subject is not at present obtainable, but the vagrant character of the mineral, and the porous sand rock in which it is found and through which it moves, fully justify the general conclusion we have stated above, and have led to its general adoption by practical operators. Ohio Oil Co. v. Kelley, 9 Ohio Cir. Ct. Rep. 511, 6 Ohio Cir. Dec. 470 (1895); Wettengel v. Gornelly, 160 Pa. St. 559, 18 Mor. Min. Rep. 93, 28 Atl. 934, 40 Am. St. Rep. 733 (1894).

And the courts will take judicial notice of these characteristics, and will presume them known to the parties entering into a gas or oil lease, and that they contracted with reference thereto. Ohio Oil Co. v. Kelley, 9 Ohio Cir. Ct. Rep. 511, 6 Ohio Cir. Dec. 470 (1895).

Belleville Township, Chautauqua County, State of Kansas, on the waters of Hickory Creek. Second party shall have use of sufficient oil, water and gas free to run all necessary machinery for operation of said lease and the right to lay pipe lines for water and gas on and across said premises; also the right to remove any machinery or fixtures placed on the premises by, * * * and may at any time surrender this lease and be released from all liabilities thereunder upon payment of ten dollars. All conditions and covenants herein shall extend to the heirs, suc-

The nature of oil and gas, the pressure of the superincumbent rocks, and the vagrant habit of both fluids under the influence of this pressure, must enter into the contemplation of both parties to an oil lease. Gadbury v. Ohio & Indiana C. N. & I. Gas Co., 162 Ind. 9, 22 Mor. Min. Rep. 680, 67 N. E. 259, 62 L. R. A. 895 (1903); Kleppner v. Lemon, 176 Pa. St. 502, 18 Mor. Min. Rep. 404, 35 Atl. 109 (1896).

An oil lease drawn by an ignorant person at a time when the nature of the mineral was but little known must be construed with reference to the knowledge of the parties and the whole country as to the subject-matter in an attempt to ascertain the real intention of the parties, and especially is this true where a man acts as his own scrivener and uses legal terms without a knowledge of their true or precise legal import. French v. Brewer, 3 Wall. Jr. 346, 11 Mor. Min. Rep. 108, Fed. Cas. No. 5,096 (1861).

In construing a mining lease in order to determine what the parties meant by the words employed, the situation of the parties and the facts and circumstances surrounding the transaction at the time of the execution of the contract, as also its subject-matter and the object of the parties in making it, may be taken into consideration. St. Louis & Denver L. & M. Co. v. Tierney, 5 Colo. 582, 2 Mor. Min. Rep. 381 (1881); Colorado Fuel & Iron Co. v. Pryor, 25 Colo. 540, 19 Mor. Min. Rep. 544, 57 Pac. 51 (1898).

Oil leases must be construed with reference to the known characteristics of the business. Gadbury v. Ohio & Indiana C. N. & I. Gas Co., 162 Ind. 9, 22 Mor. Min. Rep. 680, 67 N. E. 259, 62 L. R. A. 895 (1903).

Gas and oil contracts must be construed with reference to the surrounding circumstances and the objects to be attained. Pittsburg-Columbian Oil & Gas Co. v. Broyles (Ind. App.), 91 N. E. 754 (1910).

The whole instrument, the situation of the parties, and the subject-matter will all be considered together in construing a gas or oil lease. Bellevue Gas & Oil Co. v. Pennell, p. ——, this volume.

It would not only be unjust, but contrary to the well-settled rules of construction, to dispose of a case involving a mining lease upon any narrow or technical view based upon any particular word or clause in the lease. The instrument should be examined as a whole in order to arrive at a conclusion in entire accord with the intention of the parties making it, in harmony with the surrounding circumstances then existing and consistent with each and all of the provisions of the instrument itself. Harlow v. Lake Superior Iron Co., 36 Mich. 105, 9 Mor. Min. Rep. 47 (1877).

Where a lease is made for a certain term, "and so long as gas or oil are produced in paying quantities," the term is not fixed, but depends on the true intent of the parties. Herrington v. Wood, 6 Ohio Cir. Ct. Rep. 326, 3 Ohio Cir. Dec. 475 (1892).

It is the intention of the parties which constitutes a transaction a lease, and not the form in which the instrument runs;

cessors or assigns of the parties thereto. All erasures and interlineations made before signing. In witness whereof, we, the said parties of the first and second parts, have hereunto set our hands the day and year first above written."

Afterwards, a gas well was completed within the time limited by the lease, and gas was piped therefrom to the home of the lessor, who used gas therefrom for domestic purposes prior to, and since, August 13, 1904. On August 13, 1904, plaintiff in error paid in cash the $100 stipulated in

no matter if the form be that of a license, covenant or agreement, it may in legal effect amount to a lease as effectually as if the most technical terms were made use of for that purpose. Watson v. O'Hern, 6 Watts (Pa.) 362, 8 Mor. Min. Rep. 333 (1837).

Undoubtedly the court will construct a warranty or other contract where none is in terms expressed by the parties, if common sense of justice requires it and it is essential to complete the definition of the relation plainly intended to be established between the parties, and its terms can be clearly deduced from the instrument and from the nature of the transaction. Harlan v. The Lehigh Coal & N. Co., 35 Pa. St. 287, 8 Mor. Min. Rep. 496 (1860).

Oil lease must be construed with reference to the known character of the oil business and the evident intention of the parties. McNish v. Stone (Pa.), 17 Mor. Min. Rep. 22 (1879).

A well-settled principle of law is that a contract shall be construed as a whole, and in the light of the purposes and objects for the accomplishment of which it was made. Oil leases are no exception to the rule, and, as the subject-matter of the lease is peculiar in its nature, the courts have given this principle great latitude in their construction. Parish Fork Oil Co. v. Bridgewater Gas Co., 51 W. Va. 583, 22 Mor. Min. Rep. 145, 42 S. E. 655, 59 L. R. A. 566 (1902).

Surrounding circumstances and the circumstances of parties executing the lease will be looked into. Wheatley v. Westminster Brymbo Coal Co., L. R. 9 Eq. (Eng.) 538, 8 Mor. Min. Rep. 553 (1869); Sobey v. Thomas, 39 Wis. 317, 4 Mor. Min. Rep. 359 (1876).

The phrase in oil leases "found or produced in paying quantities" means paying quantities to the lessee or operator. If oil has not been found and the prospects are not such that the lessee is willing to incur the expense of a well, the stipulated condition for the termination of the lease has occurred; so also if oil has been found, but no longer pays the expense of production. It is for the judgment of the operator and not the lessor, when exercised in good faith, to say whether a sufficient profit to continue operation is realized. Young v. Forest Oil Co., 194 Pa. St. 243, 20 Mor. Min. Rep. 345, 45 Atl. 121, 30 Pittsburg L. J. (N. S.) 221 (1899).

A lease for "the term of three years, or as much longer as gas or oil is found in paying quantities" is a lease for three years only unless gas or oil is found in paying quantities before the expiration of that time. Shellar v. Shivers, 171 Pa. St. 569, 18 Mor. Min. Rep. 260, 33 Atl. 95 (1895).

VI. Real Consideration Considered.

In determining whether a condition is to be applied, it is important to note that the substantial consideration which moves a grantor to execute such a grant is the hope of profit or royalties if oil or gas is discovered, and even if the grantee had paid one dollar, a technically valuable consideration, the lease would be construed with the fact in view that a

the lease as the annual rent for a gas well. On August 13, 1905, defendant presented to the plaintiff, as payment of the rent for the year just expired, an account for gas used by him, amounting to $97, together with $3 cash, which was refused by the plaintiff, and this action was commenced to recover said rent. The case was submitted to the court upon an agreed statement of facts, which, so far as material, reads: "Agreed Statement of Facts. It is admitted that the well was drilled within the

more substantial reason or reasons prompted the making of the grant. Gadbury v. Ohio & Indiana C. N. & I. Gas Co., 162 Ind. 9, 22 Mor. Min. Rep. 680, 67 N. E. 259, 62 L. R. A. 895 (1903); Huggins v. Daley, 99 Fed. 606, 20 Mor. Min. Rep. 377, 40 C. C. A. 12, 49 L. R. A. 320 (1900); Federal Oil Co. v. Western Oil Co., 112 Fed. 373, 22 Mor. Min. Rep. 25 (1902).

VII. Nature of Lessee's Title.

A. Inchoate—No Estate Vests until Mineral Found.

Under a gas and oil lease the title of the lessee is inchoate, and for purposes of exploration only. Florence Oil & R. Co. v. Orman, 19 Colo. App. 79, 73 Pac. 628 (1903).

Oil and gas are not subject to absolute ownership until found and reduced to possession, and therefore a grant of oil and gas in certain land passes no title until it is actually found. Poe v. Ulrey, 233 Ill. 56, 84 N. E. 46 (1908).

A lease to explore for oil and gas, and if found, to produce them, gives no title to the oil or gas until found. Gillespie v. Fulton Oil and Gas Co., 239 Ill. 326, 88 N. E. 192 (1909); Eaton v. Allegheny Gas Co., 122 N. Y. 416, 25 N. E. 981 (1890); Conklin v. Krandusky, 127 App. Div. 761, 112 N. Y. Supp. 13 (1908).

A gas and oil lease for one year, and so long thereafter as oil or gas shall be produced in paying quantities, expires at the expiration of the first year unless gas has been so found. Chaney v. Ohio & I. Oil Co., 32 Ind. App. 193, 69 N. E. 477 (1904).

A lessee under a gas and oil lease granting the right to explore, develop, etc., acquires no title until the gas or oil is actually discovered and severed, so as to become personal property. Kansas Natural Gas Co. v. Board of Com'rs of Neosho County, 75 Kan. 335, 89 Pac. 750 (1907).

No title to the oil vests in the lessee until it has been taken from the ground and reduced to possession. Wagner v. Mallory, 169 N. Y. 501, 22 Mor. Min. Rep. 42, 62 N. E. 584, affirming 58 N. Y. Supp. 526 (1902); Shepherd v. McCalmont Oil Co., 38 Hun (N. Y.) 37 (1885).

There can be no property in rock or mineral oil, and the title thereto cannot be devested or acquired until the mineral has been discovered and taken from the earth. Funk v. Haldeman, 53 Pa. St. 229, 7 Mor. Min. Rep. 203 (1866); Appeal of Thompson, 101 Pa. St. 225 (1882); Duffield v. Hue, 136 Pa. St. 602, 20 Atl. 526 (1890); Venture Oil Co. v. Fretts, 152 Pa. St. 451, 17 Mor. Min. Rep. 543, 25 Atl. 732 (1893); Plummer v. Iron Co., 160 Pa. St. 483, 28 Atl. 853 (1894).

A lease for the purpose of operating oil and gas for the period of five years and so much longer as oil or gas is found in paying quantities on no other consideration than prospective oil royalty and gas rental, vests no present title in the lessee except the mere right of exploration; but the title thereto, both as to the period of five years and the time thereafter, remains inchoate, contingent on the finding, under the explorations provided for in such lease, of oil and gas in paying quantities. Steelsmith v.

time prescribed in the lease, and that on the 13th day of August, 1905, $100 was due to the plaintiff for rental for the gas well. It is also admitted that on the 13th day of August, 1905, defendant presented to the plaintiff the itemized statement, a copy of which is attached to its answer, and $3 in cash, which defendant offered in payment for said $100, which was refused by the plaintiff. It is also admitted that on August 12, 1904, defendant, through its agent, J. B. Swan, paid $100 as rental on said gas well to the plaintiff, and that plaintiff would testify that,

Gartlan, 45 W. Va. 27, 19 Mor. Min. Rep. 315, 29 S. E. 978, 44 L. R. A. 107 (1898).

Until oil is discovered in paying quantities, the lessee acquires no title under an oil lease. Parish Fork Oil Co. v. Bridgewater Gas Co., 51 W. Va. 583, 22 Mor. Min. Rep. 145, 42 S. E. 655, 59 L. R. A. 566 (1902).

Title under a lease only for production of oil and gas is inchoate and contingent and for purposes of search only until oil or gas is found. If not found, no estate vests in the lessee and his right, whatever it is, ends when the unsuccessful search is abandoned. If found, then the right to produce becomes a vested right upon the terms of the lease. Lowther Oil Co. v. Miller-Sibley Oil Co., 53 W. Va. 501, 22 Mor. Min. Rep. 656, 44 S. E. 433, 97 Am. St. Rep. 1027, *sub nom.* Urpman v. Lowther Oil Co., 53 W. Va. 501, 22 Mor. Min. Rep. 656, 44 S. E. 433 (1903).

An oil and gas lease giving the lessee the right, for the period of ten years to explore for oil and gas, and providing that if a well is not completed on the leased premises within three months from the date of the lease, the lessee shall pay to the lessor in advance a quarterly cash rental for each additional three months the completion of a well is delayed, is an executory contract, and vests no title in the lessee to the oil and gas in place. Smith v. Root (W. Va.), 66 S. E. 1005 (1910).

After discovery of oil in paying quantities it is held that the title does vest in the lessee, but there is no case which goes so far as to announce that after mere discovery of oil the lessee, upon the assumption of a vested interest or title, may cease operation, refuse to develop the property, tie up the oil by his lease, and simply hold it for speculative purposes or to await his own pleasure as to the time of development. Parish Fork Oil Co. v. Bridgewater Gas Co., 51 W. Va. 583, 22 Mor. Min. Rep. 145, 42 S. E. 655, 59 L. R. A. 566 (1902).

As to lease being a sale of the mineral in place, see *post* VII, E, this note.

B. Vested Right when Found.

If oil is found, then the right to produce becomes a vested right, and the lessee will be protected in exercising it in accordance with the terms and conditions of the contract. Crawford v. Ritchey, 43 W. Va. 252, 27 S. E. 220 (1897).

The discovery of oil or gas, unless there is something to the contrary in the lease, creates a vested estate in the lessee of an exclusive right to produce the oil or gas as provided in the lease. Easton Oil Co. v. Coulehan, 65 W. Va. 531, 64 S. E. 836 (1909).

Gas or oil lease does not carry title to those minerals even after a paying well has revealed them; but an estate, a right of value, then vests, that is, a right to retain possession of the land for operation and to go on to sever the minerals from the land, converting them into personalty. McGraw Oil & Gas Co. v. Kennedy, 65 W. Va. 595, 54 S. E. 1027 (1909).

at the time said payment was made, he (the plaintiff) handed said Swan the copy of said oil and gas lease, which Swan read before making said payment, and, if Swan was present, he would testify that he made said payment, without knowledge of the terms and conditions of this lease and gave a check, because he feared that unless he did so the lease would expire the next day. The defendant presented no bill to the plaintiff for the gas used during the years of 1903 and 1904."

C. Relation of Landlord and Tenant.

Under the lease giving lessees right to go upon land and prospect for oil, the relation of landlord and tenant does not arise where the lessees do not take possession. Diamond Plate Glass Co. v. Curless, 22 Ind. App. 346, 19 Mor. Min. Rep. 682, 52 N. E. 782 (1899).

By a lease granting a term of five years or so long as oil or gas should be found in paying quantities, and providing that the lessee should commence operations within a given time or in lieu thereof pay a certain amount per annum, the relation of landlord and tenant does not exist, and in the absence of any work by the lessee, the lease could be terminated at the end of any year by either of the parties. Indiana Natural Gas & Oil Co. v. Pierce, 34 Ind. App. 523, 68 N. E. 691 (1903).

Under lease "for the purpose and with the exclusive right of drilling and operating for petroleum and gas" for a certain term, where gas is obtained in sufficient quantities to justify its marketing, the relation of landlord and tenant was established, and the tenant was under obligation to operate for the common good of both parties and pay the rent or royalty reserved. Iams v. Carnegie Natural Gas Co., 194 Pa. St. 72, 20 Mor. Min. Rep. 335, 45 Atl. 54 (1899).

D. When a Mere Option.

A lease granting the right to mine for oil and gas, but not requiring the lessee to do anything, is a mere option, and may be withdrawn by the lessor at any time before the lessee has taken action under it. Cortelyou v. Barnsdall, 236 Ill. 138, 86 N. E. 200 (1908).

Under a provision that unless the grantee sinks a well within ninety days, the grant should be null and void unless the grantee paid a certain amount, held that as it was optional with the grantee to do or not to do anything, and there was no obligation upon him to pay anything where no well was put down. Brooks v. Kunkle, 24 Ind. App. 624, 20 Mor. Min. Rep. 540, 57 N. E. 260 (1900).

An oil and gas lease granting right to prospect, but not obligating lessee to do anything, is a mere option. O'Neill v. Risinger, 77 Kan. 63, 93 Pac. 340 (1908).

An oil lease imposing no obligation on the lessee to explore and discover oil or to work the property when it is discovered is a mere voluntary option, which the lessor can withdraw at any time before its acceptance. Eclipse Oil Co. v. South Penn Oil Co., 47 W. Va. 84, 34 S. E. 923, 20 Mor. Min. Rep. 234.

A clause in a lease giving the lessee the right at any time to surrender up the lease and be released from all moneys due and covenants unfulfilled, renders the lease invalid at least until some consideration has passed from the lessee to the lessor. Eclipse Oil Co. v. South Penn Oil Co., 47 W. Va. 84, 34 S. E. 923, 20 Mor. Min. Rep. 234.

The granting of a new lease to a third party is a declaration by the owner that he considered an outstanding lease terminated. Shepherd v. McCalmont Oil Co., 38 Hun (N. Y.) 37 (1885); Conkling v. Krandusky, 127 App. Div. 761, 112 N. Y. Supp. 13 (1908).

The plaintiff recovered, and the defendant, as plaintiff in error, brings the case here for review. Affirmed.

Joseph P. Rossiter—for plaintiff in error.

J. R. Charlton—for defendant in error.

GRAVES, J. (after stating the facts as above). The only controversy between the parties arises upon the proper interpretation to be given to subdivision 6 of the lease, which reads: "To pipe gas to the

Where the lessor has a right to terminate a lease at any time, he effectually does so by making a new lease, and giving possession to another. Eclipse Oil Co. v. South Penn Oil Co., 47 W. Va. 84, 34 S. E. 923, 20 Mor. Min. Rep. 234.

E. Sale of Oil in Place, etc.

Under an ordinary oil lease, title to the oil in place is not in the lessee. Backer v. Penn Lubricating Co., 162 Fed. 627, 89 C. C. A. 419 (1908).

A grant to the oil and gas passes nothing which can be subject of ejectment or other real action. It is a grant not of the oil that is in the ground, but to such part thereof as the grantee may find. Watford Oil & Gas Co. v. Shipman, 233 Ill. 9, 84 N. E. 53, 122 Am. St. Rep. 144 (1908).

An ordinary mining lease is not a sale of the mineral in place as a severed portion of the land, but an executory agreement for the sale of an amount of the mineral to be determined by actual mining. Genet v. President of Delaware & H. Canal Co., 136 N. Y. 593, 32 N. E. 1078, 19 L. R. A. 127 (1893).

Oil in place is a mineral, and being a mineral is a part of the realty. An oil lease investing the lessee with the right to remove all the oil in place in the premises in consideration of his giving the lessors a certain per centum thereof, is, in legal effect, a sale of a portion of the land, and the proceeds represent the respective interests of the lessors in the premises. Timlin v. Brown, 158 Pa. St. 606, 28 Atl. 236 (1893); Blakely v. Marshall, 174 Pa. St. 425, 18 Mor. Min. Rep. 350, 34 Atl. 564 (1896).

The distinction expressed in Blakely v. Marshall (174 Pa. St. 425, 18 Mor. Min. Rep. 350, 34 Atl. 564), and other cases is criticized if not overruled in a later case, where the court say "the expression that a conveyance of coal in place even by a lease for a remote term is a sale, is inaccurate as a general proposition of law and unfortunate from its tendency to mislead." Demuston v. Haddock, 200 Pa. St. 426, 50 Atl. 197 (1901).

Ordinarily an oil lease is not to be viewed as a conveyance of the oil in the ground. Its purpose is to confer the right to exploit the ground and acquire title to the oil by its extraction from the ground. The subject-matter is the process and opportunity of extracting the oil, which, when produced, undoubtedly becomes property. This privilege or right is clearly the subject of contract, as much so as the right to mine for minerals. The fact that oil in the earth is flowing or fugitive in its nature instead of stationary can make no difference. O'Neil v. Sun Company (Tex. Civ. App.), 125 S. W. 172 (1909).

An oil lease investing the lessee with the right to remove all the oil in place in the premises in consideration of his giving the lessors a certain per cent. thereof is in legal effect a sale of a portion of the land. Williamson v. Jones, 39 W. Va. 231, 19 S. E. 436, 25 L. R. A. 222

house for domestic purposes as soon as well is completed." The defendant in error insists that under this clause, gas is to be delivered at his home free, and therefore the account presented by the gas company does not constitute any claim against him. On the other hand, the gas company claims that the word "free" is not used in this clause, and should not be arbitrarily read into it. The trial court decided that, taking the whole instrument, the situation of the parties, and the subject-matter of the contract together, it was apparent that the parties intended that gas should be furnished without charge. It will be observed that this

(1894); Wilson v. Youst, 43 W. Va. 826, 28 S. E. 781, 39 L. R. A. 292 (1897).

The lease of a tract of land for oil and gas purposes is a conditional, contingent sale of the oil and gas in place. The title is inchoate, and dependent on the finding of the oil and gas by the purchaser in a limited number of days. The sale never becomes absolute and fully consummated until the conditions thereof are fulfilled and the contingency on which consummation depends happens, and if they fail by reason of the default of the purchasers, the sale is at an end. Lawson v. Kirchner, 50 W. Va. 344, 21 Mor. Min. Rep. 683, 40 S. E. 344 (1901).

During the life of the lease the lessee has such an interest in the oil and gas in place that he can prevent any other person, even the owner of the land, from committing waste by the extraction of such oil or gas. Lawson v. Kirchner, 50 W. Va. 344, 21 Mor. Min. Rep. 683, 40 S. E. 344 (1901).

What the lessee acquires by discovery is the right to produce and take the oil, paying out of it the stipulated royalty and not title to the oil as it remains in the ground without production. Parish Fork Oil Co. v. Bridgewater Gas Co., 51 W. Va. 583, 22 Mor. Min. Rep. 145, 42 S. E. 655 (1902).

The ordinary oil and gas lease giving the lessee for a term of years the right to mine and operate for oil and gas is not a sale of the oil and gas in place, and the lessee has no vested estate therein until it is discovered; but when found the right to produce becomes a vested right, and when extracted, the title vests in the lessee, and the consideration or royalty paid for the privilege of search and production is rent for the leased premises. Headley v. Hoopengarner, 60 W. Va. 626, 55 S. E. 744 (1906).

While an oil or gas lease is a sale of real estate so far as the lessors are concerned, it is only of such part thereof as the lessee may be able to find and to convert into personalty. Lawson v. Kirchner, 50 W. Va. 344, 21 Mor. Min. Rep. 683, 40 S. E. 344 (1901).

As to title being inchoate and dependent on discovery of mineral, see *ante* VIII, A, this note.

F. Corporeal or Incorporeal Hereditament.

Leases of coal, stone, and other like material are corporeal hereditaments, constitute an essential part of the land itself, and are capable of present absolute grant, while oil and gas are of a fugitive and volatile nature, a grant of either of which creates only an inchoate right which will become absolute upon its reduction to possession. A lease to mine for oil or gas is a mere incorporeal right, to be exercised in the land of another. It is a *profit a prendre* which may be held separate and apart from the possession of the land itself. Federal Oil Co. v. Western Oil Co., 112 Fed. 373, 22 Mor. Min. Rep. 25 (1902).

A lease of land for a certain term of years, with the sole and exclusive right

is one of the agreements on the part of the grantee which constitutes the consideration for the lease. This clause expressly limits the amount to be furnished to "domestic purposes." Why this limitation, if all the gas furnished was to be paid for at its market value? No price is named in this clause, or anywhere in the lease for the gas furnished. This omission seems at least unusual, if it was intended that the gas should be paid for. The omission of the gas company to collect or demand payment for gas used prior to August, 1904, is also unusual, if payment therefor was expected. We are unable to say that the district court erred in its interpretation of this clause.

The judgment is affirmed.

to mine for all minerals, rendering a certain portion thereof to the lessor, passes a corporeal hereditament. Chicago & Allegheny Oil & Min. Co. v. United States Petroleum Co., 57 Pa. St. 83, 12 Mor. Min. Rep. 570 (1868).

An oil lease giving right to drill upon land, and to the oil and gas recovered subject to certain conditions, creates but an incorporeal hereditament. Managhan v. Mount, 36 Ind. App. 188, 74 N. E. 579 (1905).

The right to enter upon land and bore for oil is but an incorporeal hereditament, and not sufficient to support ejectment. Union Petroleum Co. v. Bliven Petroleum Co., 72 Pa. St. 173, 3 Mor. Min. Rep. 107 (1872).

G. Freehold.

The right to go upon land and occupy it for the purpose of prospecting, if of unlimited duration, is a freehold interest, but such interest, being vested for a specific purpose, becomes extinct when the purpose is accomplished or the work is abandoned. Watford Oil & Gas Co. v. Shipman, 233 Ill. 9, 84 N. E. 53, 122 Am. St. Rep. 144 (1908).

H. Chattel Real.

Under a lease granting exclusive right to enter on premises, bore wells, and do whatever might be necessary for the production of oil, paying a portion thereof to the lessor if oil be found, vests no present title to the oil in place. It leaves the title in the landlord until it is brought to the surface. The right vested in the lessee is an estate for years so far as necessary for the purpose of taking oil from the land, and it carries with it the right to extract the oil and remove it from the premises. This right constitutes for the term prescribed a servitude on the land, and a chattel real at common law. Graciosa Oil Co. v. Santa Barbara County, 155 Cal. 140, 99 Pac. 483, 20 L. R. A. (N. S.) 211 (1909).

As to exploration, development, and operation required under gas or oil lease, see note to Eclipse Oil Co. v. South Penn Oil Co., 47 W. Va. 84, 34 S. E. 923, 20 Mor. Min. Rep. 234.

As to effect of nonexistence or exhaustion of mineral on oil or gas lease, see VII, note to Bannan v. Graeff, *post*, p. 553.

ZEIGER v. DOWDY et al.

[Supreme Court of Arizona, March 25, 1911.]

— Ariz. —, 114 Pac. 565.

1. **Public Domain—Occupant.**
An occupant of the public lands, in the absence of any showing under townsite or other laws, is a licensee, subject to the rights of one making a valid entry thereon.

2. **Mining Claim—Discovery.**
Discovery of mineral is essential to the validity of a mining claim.

3. **Same—Relocation.**
One claiming under a relocation is precluded from denying the validity of the prior location.

4. **Same—Occupant.**
One who has abandoned an attempted relocation and claims the land merely as an occupant is not estopped to deny the validity of the prior location.

Appeal from the District Court, Yavapai County, Doe, Justice.

Action to quiet title by J. T. Dowdy and another against Edward Zeiger. Judgment for plaintiffs. Defendant appeals. Reversed and remanded.

For appellant—Norris & Smith.

For appellees—Robert E. Morrison.

CAMPBELL, J. Appellees brought this action to quiet title to a placer mining claim, the complaint alleging a discovery, by the plaintiffs, of mineral upon the unoccupied mineral lands of the United States and the performing of the various acts of location required by law, and that the defendant claimed some interest therein by virtue of an attempted relocation of the ground. The defendant, appellant here, answering, denied that plaintiffs made any discovery of mineral, denied that the ground was mineral in character, denied that he claimed any interest therein by virtue of any attempted location, and alleged that he claimed a portion of the ground in controversy by reason of the fact that for more than ten years last past there has been a settlement, village, or town upon the

NOTE.
Effect of subsequent town-site patent upon valid mining location, see note to Golden v. Murphy, vol. 3, this series.

ground attempted to be located by the plaintiffs as a mining claim; that many houses for residence and business purposes have been erected thereon, some of which defendant purchased and is in possession of, and upon which he and his grantors have paid taxes for a number of years; and that the ground was not unoccupied at the time plaintiffs attempted to make their location. At the trial the plaintiffs produced testimony tending to establish the character of the ground as placer mineral ground, the discovery of mineral thereon, and the performance of the various acts of location. A location notice, filed by the defendant, whereby he sought to relocate the ground covered by the plaintiffs' location, because of forfeiture incurred by failure to do the annual assessment work during the year 1908, was also put in evidence. An objection to any testimony on the part of the defendant was sustained, and judgment entered for plaintiffs, from which and the order denying a new trial this appeal is prosecuted.

In the absence of any showing that he is seeking to connect himself with the government title under the town-site or other public land laws of the United States, we do not think appellant can claim any rights other than those of an occupant of the public lands. His rights are those of a licensee of the government, and he must give way to one who makes a valid entry of the land under the public land laws. But, until a valid entry is made, only the government may complain of his occupancy. The plaintiffs may have their title quieted only if they have one.

It is essential to the validity of a mining claim that the ground be mineral in character, and that a discovery of mineral within the confines of the claim be made. Sections 2329, 2330, Rev. St. U. S. (U. S. Comp. St. 1901, p. 1432). Chrisman v. Miller, 197 U. S. 313, 25 Sup. Ct. 468, 49 L. Ed. 770.

The defendant offered evidence tending to prove that the ground is nonmineral; that no discovery was made; that no location notice was posted by plaintiffs within the boundaries of their claim; and that his grantor was in actual possession at the time plaintiff attempted to make their location. All of this evidence should have been received unless it may be said, as contended by appellees, that the defendant is precluded from denying the validity of the location by reason of having attempted a location. That he would be held to have impliedly admitted the validity of plaintiffs' location, were he claiming under the relocation, is undoubtedly true. Belk v. Meagher, 104 U. S. 279, 26 L. Ed. 735; Providence Gold Mining Co. v. Burke, 6 Ariz. 323, 57 Pac. 641; Zerres v. Vanina, 150 Fed. 564, 80 C. C. A. 366.

These authorities, however, go no further than to hold that the relocator may not show the invalidity of the original location where he

claims under his relocation; and we are unwilling to enlarge the doctrine to the extent of holding that one who has attempted a relocation, but who has abandoned it and expressly renounced any claim under it, but who nevertheless claims an interest in some other right which would entitle him to be heard had he never attempted such relocation, may not show that the original locator never made a location, but is in fact perpetrating a fraud upon the government. It is true that he is upon the public lands as a mere licensee, but his rights in that respect are at least equal to those of the plaintiffs, if the latter's claim as mineral locators is invalid. "The right to the possession comes only from a valid location. Consequently, if there is no location, there can be no possession under it." Belk v. Meagher, *supra*. Appellees appear to rely upon the case of Veronda & Ricoletto v. Dowdy (Ariz.), 108 Pac. 482. We there decided that a trespasser making no claim to the land under any of the public land laws could not be heard to urge, against one who had made a discovery upon mineral land and performed the acts of location, that the land was more useful for purposes other than mining. See Haws v. Victoria Copper Mining Co., 160 U. S. 303, 16 Sup. Ct. 282, 40 L. Ed. 436. We do not perceive that anything we there said is authority for the position assumed by appellees in this case.

For the reasons indicated, the judgment of the district court is reversed, and the cause remanded for a new trial.

KENT, C. J., and DOAN and LEWIS, JJ., concur.

GRANT'S PASS BANKING & TRUST CO. v. ENTERPRISE MINING CO.; CONDOR WATER & POWER CO. v. ENTERPRISE MINING CO. et al.

[Supreme Court of Oregon, March 7, 1911.]

— Or. —, 113 Pac. 858.

1. **Mining Lien—Supplies Defined.**

The word "supplies," as used in the mining lien statute, is defined as "any substance the use of which might reasonably tend to the working or contribute to the development of a mine."

2. **Same—Electricity.**

Electricity is a supply within the meaning of the mining lien statute.

3. **Same—Limitations.**

The right to file a proper lien continues until the expiration of the time allowed to file an original lien, notwithstanding prior unsuccessful attempts.

4. **Same—Priority over Mortgage.**

A lien for materials furnished prior to a mortgage takes precedence over the latter although not filed until after the institution of proceedings to foreclose the mortgage.

Appeal from the Circuit Court, Jackson County; H. K. Hanna, Judge.

Consolidated actions to foreclose a mortgage and to establish a mining lien by the Grant's Pass Banking & Trust Company against the Enterprise Mining Company, and by the Condor Water & Power Company against the Enterprise Mining Company and the Grant's Pass Banking & Trust Company. Decree foreclosing the mortgage subject to the mining lien. The Banking & Trust Company appeals. Affirmed.

For appellant—O. S. Blanchard and H. D. Norton.

For respondent—A. E. Reames and R. G. Smith.

This is a controversy between creditors as to the validity and priority of a lien. A suit was commenced March 12, 1907, by the Grant's Pass Banking & Trust Company to foreclose a mortgage of certain mining property executed to it October 19, 1906, by the Enterprise Mining Company to secure the payment of $6,000. The Condor Water & Power Company was made a party defendant; the complaint alleging that it claimed some interest in the premises inferior to plaintiff's mortgage.

NOTE.

As to services for which mechanics' liens are allowed on mining claims, see note to Gray v. New Mexico Pumice Stone Company, *ante*, p. 157.

That defendant, alone answering, denied that its claim was subordinate to that of the plaintiff, set forth facts tending to show that it had a prior lien on the real property, and thereupon commenced a suit against the Enterprise Mining Company and the Grant's Pass Banking & Trust Company, averring that, pursuant to the terms of a written contract entered into with the former, it had supplied between October 31, 1905, and March 1, 1907, certain material and furnished electricity for illumination and for the operation of a quartz mill on the premises amounting to $3,570.28, on account of which $1,527.20 had been paid, leaving due $2,043.08, to secure the payment of which a lien on the land, building, machinery, etc., was filed March 20, 1907. Issues having been joined, the suits were consolidated and tried, resulting in a decree foreclosing the mortgage and the lien, but making the latter superior, and plaintiff appeals.

MOORE, Judge (after stating the facts as above). The statute giving a lien on mines, so far as involved herein, is as follows: "Any person who shall furnish any provisions, materials or supplies for the working or development of any * * * mine * * * shall have a lien upon such mine * * * to secure him the payment for the * * * material furnished which lien shall attach in every case to such mine." L. O. L. § 7444. "The liens provided for in this act are preferred liens." Id., § 7447. To uphold the decree rendered, electricity, when furnished at a mine for illumination or for power, must be construed to be a "supply," thereby bringing it within the designation of the enactment quoted. As applied to material objects, a supply is understood, in its restricted sense, to mean any substance that is consumed with its use. A supply, in its more general signification, is anything required or furnished to meet a need. 8 Words & Phrases, 6802. As used in the statute under consideration, "supplies" undoubtedly comprise any substance the use of which might reasonably tend to the working or contribute to the development of a mine. Electricity, when employed to illumine a mine, enables laborers to work therein with almost the same success as in the daylight, thus materially contributing to the search for and the development of a mineral vein. The object of all mining operations is to secure valuable metals freed as much as practicable from all other substances. In quartz mining the crushing of rock containing mineral reduces the bulk by eliminating much of the superfluous matter, making it possible profitably to carry the resulting auriferous and argentiferous ores to market. By the use of suspended copper wires electricity can be transmitted from the place where it is generated to the mouth of a mine in almost inaccessible mountains and ravines, and there successfully used to operate quartz mills. Mines which a few years ago were almost worthless have,

by the employment of electricity, become very valuable, affording profitable employment to laborers and yielding rich returns to the owners. Electricity is capable of propelling machinery and of illuminating mine and mill by continuous operation, and as this modern agent is consumed by its use, so far as susceptible of discernment, and supplies a very urgent need tending to the proper working and development of a mine, it is believed that such force is a supply within the scope of that term and for the use of which a lien may fairly be implied from the statute.

The Enterprise Mining Company stipulated in writing to pay the Condor Water & Power Company a minimum rate of $225 a month for electricity of a specified character and voltage with which to operate the mines and mill. It is asserted by plaintiff's counsel that the evidence fails to show a use of the specified amount of power or that any of it was employed in the mine. The testimony shows that electricity was furnished at the mine of the quality and kind demanded by the terms of the contract, and, the supply having thus been delivered at the proper place, the burden of disproving the employment of the measure of the power was imposed on the Enterprise Mining Company, or on the plaintiff, who would succeed by the production of such proof. Fitch v. Howitt, 32 Or. 396, 409, 52 Pac. 192. No attempt, however, was thus made to defeat the lien. It appears that prior to March 20, 1907, the Condor Water & Power Company undertook to secure a lien, but that its efforts in that direction were futile or unsatisfactory. The corrected lien was filed within the time limited therefor after furnishing the supplies, whereupon the preceding claims were abandoned. The right to file a proper lien continued until the expiration of the time allowed to file an original lien. Jones, Liens (2d Ed.), § 1455. The lien foreclosed was not filed until after plaintiff's suit was instituted, but, as the material was furnished in part nearly a year prior to the execution of the mortgage, the lien was properly decreed to be prior to the mortgage. Henry v. Hand, 36 Or 492, 59 Pac. 330.

Other errors are assigned, but deeming them unimportant, the decree is affirmed.

HOLLETT v. DAVIS.

[Supreme Court of Washington, July 30, 1909.]

54 Wash. 326, 103 Pac. 423.

1. Spring Forming Water Course—Washington Statute.

The Washington statute (Ballinger's Ann. Code & Stats., sec. 4114; Pierce's Code, sec. 5829) which gives the owner of the land upon which the spring rises, the use of the water flowing therefrom, provided such owner can use the water upon his own premises, has no application to a spring having sufficient flow of water to form a water course.

2. Same—Rights of Riparian Proprietors.

Riparian proprietors along a water course formed by the flow of water from a spring have the right to insist that the spring be permitted to flow as it is wont to flow by nature, without material diminution or alteration, save where the right to divert is acquired by grant, prescription, or prior appropriation.

CASE NOTE.

Spring Sufficient to Form a Stream—Appropriation and Diversion.

I. In General.

A. Classes of Springs as to Origin.

Springs arising upon land are of two classes: (1) Those which are fed purely by percolating waters seeping through

3. Same—Diversion from Channel—Equitable Rights.

Where one diverts the stream of water flowing from a spring out of its original channel into a new channel, where it is permitted to flow uninterruptedly for thirty years and a third party, relying upon the continuance of the flow in the new channel, acquires lands bordering on such new channel and has made valuable improvements thereon, which will become valueless if the water is returned to the original channel, equity will regard the new or artificial channel as the natural channel of the stream.

4. Same—Estoppel.

A proprietor of land in which a spring rises from a stream who diverts such stream into an artificial channel and suffers it to remain in its changed condition for a period of time exceeding the statute of limitations, as against persons making a beneficial use of the water in such new or artificial channel, is estopped from returning the water to the natural or original channel to the injury or loss of the persons making such beneficial improvements. *Dictum.*

the surrounding earth; and, (2) those which are formed by the rising or breaking out of definite underground channels or water courses. Metcalf v. Nelson, 8 S. Dak. 87, 65 N. W. 911, 59 Am. St. Rep. 746 (1895).

As to the water rights of owners of land in which springs are located, the authorities distinguish between springs that are fed by the seepage of water generally through and from the surrounding earth and those that are formed by the outbreak upon the surface of definite underground water courses. Metcalf v. Nelson, 8 S. Dak. 87, 65 N. W. 911, 59 Am. St. Rep. 746 (1895).

Springs which are the result of the outbreak of underground water courses or channels are governed by the same rules of law that govern surface streams. Metcalf v. Nelson, 8 S. Dak. 87, 65 N. W. 911, 59 Am. St. Rep. 746 (1895).

In the absence of any evidence to the contrary, it will be presumed that a spring is formed and fed by percolating waters and that it is not the result of the outbreak upon the surface of an underground stream or channel. Hanson v. McCue, 42 Cal. 303, 10 Am. Rep. 299 (1871); Tampa Waterworks Co. v. Cline, 37 Fla. 586, 20 So. 780, 53 Am. St. Rep. 262, 33 L. R. A. 376 (1896); Swett v. Cutts, 50 N. H. 439, 9 Am. Rep. 276 (1870); Elster v. Springfield, 49 Ohio St. 82, 30 N. E., 274 (1892); Metcalf v. Nelson, 8 S. Dak. 87, 65 N. W. 911, 59 Am. St. Rep. 746 (1895). It is said that such presumption is necessary in order to obviate the difficulty of determining whether the water flows in a channel beneath the soil. Swett v Cutts, 50 N. H. 439, 9 Am. Rep. 276 (1870).

B. Classes of Springs as to Strength of Flow.

1. General Rule.

Springs are also divided, distinguished by the strength of the flow or volume of water, into two classes: (1) Those which are not of sufficient volume to form a stream or water course; and (2) those forming a natural stream or water course, however diminutive in size and volume. Where the flow of water from a spring is not sufficient in quantity or volume to form a natural stream, the waters of the spring are governed by the rules of law relating to and governing percolating waters. Metcalf v. Nelson, 8 S. Dak. 87, 65 N. W. 911, 59 Am. St. Rep. 746 (1895).

There is a distinction in the right of the proprietor in whose lands a spring rises to deal with the waters thereof between the cases in which the flow of water is sufficient to form a channel or stream and those in which it is not. In those cases in which the spring has not sufficient flow to form a channel or stream, and therefore has no outlet, the proprietor on whose land it rises is entitled to the use of all the water in the

5. Same—Evidence—Prescriptive Use.

A person making such beneficial use does not have to show a prescriptive right in himself, or a use by himself and predecessors for the period of the statute of limitations, in order to prevent the return of the water to the original channel; all he need show is that the person diverting has permitted the stream to remain in the new channel for the prescriptive period, and that he has made a beneficial use of the water. *Dictum.*

6. Same—Division of Water.

A division of the water flowing in a stream from a spring diverting into a new channel cannot be made without evidence of the quantity of water required by the upper proprietor, the proportion of water permitted to flow in the new channel, and the proportion of that permitted to flow actually used or required by the lower proprietor.

Appeal from superior court Klickitta County. Defendant appealed from judgment in favor of plaintiffs. Reversed, remanded with directions.

spring, and may conduct it to other property. Hanson v. McCue, 42 Cal. 302, 10 Am. Rep. 299 (1871).

The question of whether where percolating waters appear at the surface only at the point of the spring and at once sink away again into the surrounding soil and resume their character of wandering, seeping waters, the rights of the proprietor of the land on which the water appears come and go with the appearance and disappearance of the water, was raised but not decided in Metcalf v. Nelson, 8 S. Dak. 87, 65 N. W. 911, 59 Am. St. Rep. 746 (1895).

Where a spring arose on land of one proprietor, not sufficient in volume to form a natural stream and flow off of the premises, and was conducted by the owner through a pipe to a trough, and used for watering stock, the waste or surplus water then sinking into and percolating onto or into the land of an adjoining proprietor, not rising on the land of the latter as a stream, but seeping or percolating through the soil, making its presence manifest by brightening the color of and increasing the growth of the grass,—the court held that such a spring belongs to the owner of the land on which it arises, and is as much a part of the soil as minerals beneath the surface, and that none of the rules of law relating to water courses and diversion apply. Bloodgood v. Ayres, 108 N. Y. 400, 15 N. E. 433, 2 Am. St. Rep. 443 (1888).

Connecticut.—Roath v. Driscoll, 20 Conn. 533, 52 Am. Dec. 352 (1850); Gillett v. Johnson, 30 Conn. 180 (1861).

Massachusetts.—Greenleaf v. Francis, 35 Mass. (18 Pick.) 117 (1836); Macomber v. Godfrey, 108 Mass. 219, 11 Am. Rep. 349 (1871).

New Hampshire.—Bassett v. Salsbury Mfg. Co., 43 N. H. 569, 82 Am. Dec. 179 (1862).

New York.—Goodale v. Tuttle, 29 N. Y. 459 (1864); Village of Delhi v. Youman, 45 N. Y. 362, 6 Am. Rep. 100 (1871); Ellis v. Duncan, 21 Barb. (N. Y.) 230, 15 Mor. Min. Rep. 182 (1855).

Ohio.—Frazier v. Brown, 12 Ohio St. 294 (1861).

Pennsylvania.—Haldeman v. Bruckhart, 45 Pa. St. 514, 5 Mor. Min. Rep. 108, 84 Am. Dec. 511 (1863).

Vermont.—Chatfield v. Wilson, 28 Vt. 49 (1855).

An adjoining proprietor has no absolute and unqualified right to water percolating from land of his neighbor. Bassett v. Salsbury Mfg. Co., 43 N. H. 569, 82 Am. Dec. 179 (1862); Wheatley v. Baugh, 25 Pa. St. 528, 13 Mor. Min. Rep. 374, 64 Am. Dec. 721 (1855);

For appellant—W. B. Presby.

For respondents—E. C. Ward and N. L. Ward.

FULLERTON, J. In 1873 the predecessors in interest of the appellant settled upon and thereafter acquired from the government the N. ½ of the S. E. ¼ of section 1 in township 4 north, of range 14 east, of the Willamette meridian. Near the south side of the tract, about midway between its east and west ends, is a large perpetual spring, the stream from which originally flowed southerly in a natural channel across the S. ½ of the S. E. ¼ of section 1 and across the E. ½ of section 12, in the same township and range, into a water course called

Halderman v. Bruckhart, 45 Pa. St. 514, 5 Mor. Min. Rep. 108, 84 Am. Dec. 511 (1863).

There is not any *jus alienum* on the part of the lower proprietor, and therefore the maxim *Sic utere tuo ut alienum non laedas*, does not apply. Roath v. Driscoll, 20 Conn. 533, 542, 52 Am. Dec. 352 (1850); Brown v. Illius, 27 Conn. 84, 71 Am. Dec. 49 (1858); Trustees Wabash & E. Canal v. Spears, 16 Ind. 441, 79 Am. Dec. 444 (1861); Halderman v. Bruckhart, 45 Pa. St. 514, 5 Mor. Min. Rep. 108, 84 Am. Dec. 511 (1863).

While it is a natural law that percolating water will drain off through the lower land or tenement to its advantage or disadvantage, as the case may be, an interference in such case with the natural law, to put the water to a beneficial use upon land of the upper tenement, is justified, because the general law of society is that the owner of the land has full dominion over what is above, upon or below the surface, and the owner, in putting the water arising upon it to a beneficial use, is exercising merely legal rights. Barkeley v. Wilcox, 86 N. Y. 147, 40 Am. Rep. 519 (1881).

The proprietor of the soil on which a spring arises has more than the ordinary usufruct in the waters of the spring, so long, at least, as it is held in the spring. He may consume or dispose of it as he chooses; he might convey it away in pipes or carry it off in tanks. Metcalf v. Nelson, 8 S. Dak. 87, 65 N. W. 911, 59 Am. St. Rep. 746 (1895). See Bliss v. Greeley, 45 N. Y. 671, 6 Am. Rep. 157 (1871); Buffum v. Harris, 5 R. I. 243 (1858); Clark v. Conroe, 38 Vt. 469 (1866).

That the proprietor of land upon which a spring arises has such a property right in and to the corpus of the water in such spring as will entitle him to recover for water carried away therefrom, was held in Metcalf v. Nelson, 8 S. Dak. 87, 65 N. W. 911, 59 Am. St. Rep. 746 (1895).

Where a spring, not sufficient in volume to form a natural stream or water course, arises on unoccupied public lands, but the waters thereof are appropriated by means of an artificial channel extended into the spring, the appropriator acquires a right thereto under the United States Statutes, sections 2339, 2340, and Oregon Session Laws, 1893, p. 150. Brosnan v. Harris, 39 Or. 148, 150, 65 Pac. 867, 87 Am. St. Rep. 649, 54 L. R. A. 628.

As to appropriation of the waters of springs, see I, C, this note.

2. Pacific Coast Doctrine.

In the Pacific Coast states and territories, where they have much arid land and scarcity of water, the common-law rules governing water are held to be inapplicable to local conditions, or applicable only to a limited extent, and do not

Mill Creek. The water from the spring formed a natural water course, flowing at all seasons of the year a considerable body of water. To the west of the spring, and separated therefrom by a slight ridge, was a natural channel through which water flowed during the wet season of the year, called Gilmore Creek. This creek had its source to the north of the appellant's land, and ran in a southwesterly direction across his land in section 1, and through the W. ½ of the N. W. ¼, and the N. ½ of the S. W. ¼ of section 12 above mentioned. Immediately south of the spring on the land in section 1 was a marsh, to drain which the original locator cut a ditch from a point a short distance below

control as to percolating waters and waters collected in subterranean reservoirs or "artesian belts;" and it is there held that a spring cannot be diverted by a proprietor on whose land it arises, to the injury of a proprietor to whom the water naturally comes by percolation from the spring. Strait v. Brown, 16 Nev. 317, 40 Am. Rep. 497 (1881).

This Pacific Coast Doctrine will be discussed in a note to Boyce v. Cupper, 37 Or 256, in volume 2, of this series.

C. Appropriation of Waters of Springs.

1. General Rule.

The general rule in regard to appropriation of water is that all waters which have not already been appropriated to a valuable use may be appropriated, and this right includes the right to appropriate the waters of a spring which forms the source or fountain head of a stream. Ely v. Ferguson, 91 Cal. 187, 27 Pac. 587 (1891); Brosnan v. Harris, 39 Or. 150, 65 Pac. 867, 87 Am. St. Rep. 649, 54 L. R. A. 628 (1901); Scott v. Toomey, 8 S. Dak. 639, 67 N. W. 838 (1896).

See also *post* II, this note.

2. Springs Not Forming Stream.

There is no question as to ownership of the water flowing from springs on a proprietor's land where no bed or channel is formed. Razzo v. Varni, 81 Cal. 289, 22 Pac. 848 (1889); Morrison v. Officer, 48 Or. 569, 87 Pac. 896 (1896). Or as to right to divert same by the proprietor and to apply it to his own beneficial use. Bloodgood v. Ayers, 108 N. Y. 400, 15 N. E. 433, 2 Am. St. Rep. 243 (1888).

See also *post* II, this note.

Where the admitted quantity of the waters rising from a spring is so insignificant that a surface stream is impossible, the water belongs to the person upon whose land it first arises. Morrison v. Officer, 48 Or. 569, 87 Pac. 896 (1896—the decision was under B. & C. Comp., § 5019).

3. Springs Forming Stream.

The right to appropriate the waters of a spring is incident to the ownership of the land upon which the spring arises, but the right of absolute appropriation as against other landowners who would be injured thereby is limited to a reasonable use of the waters; and what constitutes a reasonable use is a question between the several landowners, except in those cases where the waters of a public stream or water course are affected. People v. New York Carbonic Acid Gas Co., 196 N. Y. 421, 90 N. E. 441 (1909), reversing 119 N. Y. Supp. 1151 (1909).

The owner of land on which a spring arises sufficient in volume to form a natural channel, which flows onto and through the land of an adjoining proprietor, will not be permitted to impound and restrain the water of the stream to the injury of lower proprietors. Howe v. Norman, 13 R. I. 488 (1882); Boynton v. Gillman, 53 Vt. 17 (1880).

the spring across the bridge into Gilmore Creek, and turned the water from the spring into that creek. This left dry a tract of meadow land containing eight or ten acres in section 12, and to irrigate this tract a new ditch was cut from Gilmore Creek, commencing at a point about one-fourth of a mile below the mouth of the first ditch mentioned, and running in a southerly direction to the meadow. Water taken through this ditch was used intermittently for a number of years to irrigate small parts of this meadow, and water was taken from the first ditch for domestic use and to irrigate a tract of about five acres lying south of the spring, but with these exceptions all the water from the

Where the waters of a spring are sufficient in volume to form a natural stream, the owner of the land on which the spring arises cannot divert the waters of the spring to the injury of a lower proprietor without rendering himself liable to compensation for injuries sustained. Colrick v. Swinburne, 105 N. Y. 503, 12 N. E. 427 (1887).

The size or volume and length of a stream arising from a spring is immaterial in determining its character as a natural water course, and the rights attaching thereto or therein, provided only it be in truth and in fact a stream within the recognized characteristics.

California.—Chavet v. Hall, 93 Cal. 407, 28 Pac. 1066 (1892).

Illinois.—School Trustees v. Scroll, 120 Ill. 509, 12 N. E. 243, 60 Am. Rep. 575 (1887).

Iowa.—Van Orsdol v. Burlington C. R. & N. T. Co., 56 Iowa 470 (1881); Hinkle v. Avery, 88 Iowa 47, 85 N. W. 55, 45 Am. St. Rep. 224 (1893).

Kansas.—Union Pac. R. Co. v. Dyche, 31 Kan. 120, 1 Pac. 243 (1883).

Massachusetts.—Luther v. Winnisimmet, 63 Mass. (9 Cush.) 171 (1851).

Mississippi.—Ferris v. Wellborn, 64 Miss. 29, 8 So. 165 (1886).

Nebraska.—Pyle v. Richards, 17 Neb. 180, 22 N. W. 370 (1885); Town v. Missouri Pac. R. Co., 50 Neb. 768, 70 Pac. 402 (1897).

Where the owner of the premises on which a spring arises wrongfully appropriates it to the injury of a lower proprietor, the injury is continuous, and is not referable to the date on which the original wrong was committed, and the fact that the date of the original wrong is beyond the statute of limitations will not prevent a recovery of damages which have accrued within the statute of limitations. Colrick v. Swinburne, 105 N. Y. 503, 12 N. E. 427 (1887). See Arnold v. Hudson River R. Co., 55 N. Y. 662 (1874), reversing 49 Barb. 108 (1867); Uline v. New York C. & H. River R. Co., 101 N. Y. 98, 4 N. E. 536, 53 Am. Rep. 123, 54 Am. Rep. 661 (1886); Waggoner v. Jermaine, 3 Denio (N. Y.) 306 (1846); Thayer v. Brooks, 17 Ohio 489, 49 Am. Dec. 474 (1848); Bare v. Hoffman, 79 Pa. St. 71, 21 Am. Rep. 42 (1875).

Where a spring is not fed by a visible stream of water flowing from beyond into it or from water arising out of the earth, and is without outlet in any definite channel, but by means of seepage and percolation of water passes through and into the land, and the spring constitutes the source of supply of a natural stream, an appropriator from such natural stream obtains rights to water in the spring which will prevent the owner of the land on which the spring arises from diverting it to his own use to the injury of the appropriator of the water in the stream. Bruering v. Dorr, 23 Colo. 195, 47 Pac. 290, 35 L. R. A. 640 (1896).

4. Springs on Public Domain.

Water arising on lands of the United States flowing from a spring may be

spring was suffered to flow down Gilmore Creek, from 1873, until it was finally diverted in 1905 and 1906, as hereinafter stated. In 1889 or 1890 one of the predecessors in interest of respondents settled upon the W. ½ of the S. W. ¼ and the N. ½ of the S. W. ¼ of section 12. The locator of the land lived thereon for about five years, during which time he acquired title thereto from the government. The only water on the premises was that flowing in Gilmore Creek, and he made use thereof during his residence on the land, for domestic and culinary purposes. In 1894 he sold to the immediate predecessor of the respondents. This person did not live on the land during the two years he

appropriated and diverted to other public land by means of ditches, etc., and then applied to valuable and beneficial purposes, and the right to the same acquired as against any one who subsequently settles upon or obtains the title to land upon which such springs are situated. Cross v. Kitts, 69 Cal. 217, 10 Pac. 409, 54 Am. Rep. 558 (1886); De Necbchea v. Curtis, 80 Cal. 397, 20 Pac. 563, 22 Pac. 198 (1889); Ely v. Ferguson, 91 Cal. 187, 27 Pac. 587 (1891); Williams v. Harter, 121 Cal. 47, 53 Pac. 405 (1898). And this is true whether the volume of water issuing from the spring is sufficient to form a natural stream or not. See Brosnan v. Harris, 39 Or. 148, 150, 65 Pac. 867, 87 Am. St. Rep. 649, 54 L. R. A. 628 (1901).

The water flowing from springs upon public land of the United States situated in California may be appropriated under provision of section 1410 of the California Civil Code, and the fact that the ditch by which the waters are conveyed is constructed up to the mouth of the spring or springs can in no wise affect the right to appropriate or the sufficiency of appropriation. Ely v. Ferguson, 91 Cal. 187, 27 Pac. 587 (1891).

II. Spring Forming Permanent Stream.

In this note it is not practical to go into a discussion of what constitutes a natural stream, but it may be remarked that in the case of Strait v. Brown, 16 Nev. 317, 40 Am. Rep. 497 (1881), it was decided that a creek having its source in a spring which ran a short distance through a natural surface channel and then discharged into a large slough, which had no natural surface outlet, was a water course.

The right of appropriation attaches to a spring furnishing a stream of water that rises to the surface. Brosnan v. Harris, 39 Or. 148, 65 Pac. 867, 87 Am. St. Rep. 649, 54 L. R. A. 628 (1901); Morrison v. Officer, 48 Or. 569, 87 Pac. 896 (1896—the decision was under B. & C. Comp., § 5019).

In case of springs which have a well-defined channel which conducts water into a stream, if the water of the latter stream is appropriated, this is, of itself, an appropriation of the water of the spring to a beneficial use. Boyce v. Cupper, 37 Or. 256, 61 Pac. 642, following Lowe v. Rizor, 25 Or. 551, 37 Pac. 82 (1894).

Where a spring is sufficiently strong to form a stream which flows into and is tributary to a river, it is considered as part of the river for the purposes of appropriation of water. Moyer v. Preston, 6 Wyo. 308, 44 Pac. 845, 71 Am. St. Rep. 914 (1896).

A spring of sufficient strength and volume to form a running stream is not governed by the Washington Statute (Ballinger's Ann. Codes and Stats., sec. 4114; Pierce's Code, sec. 5829), which gives to the owner of the land upon which the spring arises the use of the

owned it, but made use of the water in the creek for domestic purposes, and for the purposes of watering stock, hauling it from the creek to his residence. The respondents acquired the property in 1896. In that year they erected a house and barn on the premises, and moved thereon with their family, where they have resided continuously until the present time. During their occupancy they have constantly used the water flowing down the creek for domestic purposes, and for the purpose of irrigating an orchard and garden during the irrigating season of the year. There is no water on the premises during the dry season of the year either for domestic use or with which to irrigate other than that

waters flowing therefrom, provided such owner can use the water upon his own premises. Hollett v. Davis, 54 Wash. 326, 103 Pac. 423 (1909); Miller v. Wheeler, 54 Wash. 427, 103 Pac. 641 (1909).

The proprietor of land upon which arises a spring sufficient in force and quantity to create a stream of water accustomed to flow onto and through the land of the lower proprietor, has in the waters of such spring and stream the rights of a riparian owner only, and cannot divert the water from its natural channel. Lord v. Meadville Water Co., 135 Pa. St. 122, 19 Atl. 1007, 20 Am. St. Rep. 864, 8 L. R. A. 202 (1890).

A proprietor on whose land a stream commences and flows through a well-defined channel onto and through the lands of another proprietor cannot use all the waters of such stream so as to deprive other riparian owners of their rights therein. Ulbricht v. Eufaula Water Co., 86 Ala. 587, 6 So. 78, 11 Am. St. Rep. 72, 4 L. R. A. 572 (1888).

Rights cannot be acquired in the waters of springs of sufficient strength to form a running stream which are situated along the channel of a stream, and which constitute its direct source of supply, by entering upon, cleaning out, and thereby increasing the water supply, as against prior appropriations in good faith of the whole of the waters of the stream. Malad Valley Irr. Co. v. Campbell, 2 Idaho 411, 18 Pac. 52 (1888).

If persons can go upon the tributaries of streams whose waters have all been appropriated and applied to a useful and legitimate purpose, and can take and control the waters of such tributaries, then, indeed, the source of supply of all appropriated natural streams may be entirely cut off, and turned away from the first and rightful appropriators. Malad Valley Irr. Co. v. Campbell, 2 Idaho 411, 18 Pac. 52 (1888).

III. Diversion of Flow of Head Spring.

A. As to Diversion Generally, and Rights Thereunder.

A proprietor at the head of a stream who has changed the natural flow of the waters and has continued such change for more than twenty years, cannot thereafter restore it to its natural channel to the injury of lower proprietors who have made valuable improvements in reference to and because of such flow of the waters. Murchie v. Gates, 78 Me. 304, 4 Atl. 698 (1886); Belknap v. Trimble, 3 Paige Ch. (N. Y.) 577 (1832).

The relative relation and interests of parties, created or resulting from the change of natural conditions by the diversion of waters, become fixed by prescription, and embrace parties' reciprocal rights and duties at least to the extent that, so long as such relative rights exist and are asserted, each party is bound in equity to abstain from doing anything to the prejudice of the other's rights, founded upon the relations thus created

flowing in Gilmore Creek from the spring arising on the appellant's premises, and without irrigation neither fruit nor vegetables can be grown thereon. In 1904 the appellant built a dam across the original channel of the creek above the meadow, on section 12, intending to make a storage basin for the storage of water for use in irrigating on a more extensive scale than he had been wont to do theretofore, and in that year and the two years following, turned the water of the spring therein for a period during the dry season of the year, preventing any flow of the waters down Gilmore Creek to the respondents' land. This action was brought by the respondents to enjoin this diversion. They contended, and the court below decided, that the appellant by diverting

between them. Smith v. Youmans, 96 Wis. 103, 70 N. W. 1115, 65 Am. St. Rep. 30, 37 L. R. A. 285 (1895).

Where a stream of water has been diverted and permitted to flow for ten years without objection, it cannot be restored to its original course. Woodbury v. Short, 17 Vt. 387, 44 Am. Dec. 344 (1845).

It has been said that twenty years' possession of a diverted water course is necessary to defeat the proprietor of the ancient channel and prevent him from reclaiming the water. Campbell v. Smith, 8 N. J. L. (3 Halst.) 140, 14 Am. Dec. 400 (1825).

The exclusive use and enjoyment of water in a particular way for twenty years, without interruption, becomes an adverse enjoyment sufficient to raise a presumption of title as against a right in any other person which might have been, but was not, asserted. Neither is it necessary that the person claiming this prescriptive right to the use of water should have used it in the same precise manner during the twenty years. Belknap v. Trimble, 3 Paige Ch. (N. Y.) 577, 605 (1832). See Murchie v. Gates, 78 Me. 304, 4 Atl. 698 (1886); Bullen v. Runnels, 2 N. H. 257, 9 Am. Dec. 55 (1820); Watkins v. Peck, 13 N. H. 360, 40 Am. Dec. 156 (1843); Sackrider v. Beers, 10 Johns. (N. Y.) 241 (1813); Smith v. Adams, 6 Paige Ch. (N. Y.) 435 (1837); Baldwin v. Calkins, 10 Wend. (N. Y.) 167, 177 (1833); Townsend v. McDonald, 12 N. Y. 388, 391, 64 Am. Dec. 508 (1855); Hammond v. Zehner, 23 Barb. (N. Y.) 473 (1856); Law v. McDonald, 9 Hun. (N. Y.) 23 (1876); Rexford v. Marquis, 7 Lans. (N. Y.) 249, 262 (1872).

See *post* IV, E, this note.

As to what use of water will not raise presumption of grant of an easement, see Stillman v. White Rock Mfg. Co., 3 Woodb. & M. 550, Fed. Cas. No. 13,446 (1847).

Diversion of water from its natural channel acquiesced in by lower riparian owners for a period of thirty years is binding, and prevents them from changing the flow of the stream into the old channel. Matheson v. Ward, 24 Wash. 407, 64 Pac. 520, 85 Am. St. Rep. 955 (1901). See Delaney v. Boston, 2 Harr. (Del.) 489 (1839); Murchie v. Gates, 78 Me. 300, 4 Atl. 698 (1886); Matheson v. Hoffman, 77 Mich. 420, 43 N. W. 879, 6 L. R. A. 349 (1889); Kray v. Muggli, 84 Minn. 90, 86 N. W. 882, 87 Am. St. Rep. 332, 54 L. R. A. 473 (1901); Shepardson v. Perkins, 58 N. H. 354 (1878); Belknap v. Trimble, 3 Paige Ch. (N. Y.) 577 (1832); Ford v. Whitlock, 27 Vt. 265 (1855); Smith v. Youmans, 96 Wis. 1003, 70 N. W. 115, 65 Am. St. Rep. 30, 37 L. R. A. 285 (1897).

See *post* IV, E, this note.

the water for so long a time from its natural channel into Gilmore Creek made Gilmore Creek the natural channel of the stream from the spring, and estopped the appellant from returning it to its natural channel after the respondents had begun putting it to a beneficial use. A judgment was entered in that court requiring the appellant to permit forty per cent. of the water of the spring to flow down Gilmore Creek during the irrigating season of the year, and one-half thereof during the remaining time. This appeal is from the judgment so entered.

The appellant first contends that the court erred in holding that Gilmore Creek had become the natural channel of the creek flowing from the

B. Injunctive Relief.

1. Generally.

The interest in and right to the waters of a spring with sufficient flow to form a natural stream is not essentially different from the interest in and right to the waters of any other natural stream. And the interest in and right to waters, while usufructuary in character, is a property right, not essentially different in its nature from any other property right, and regulated, controlled, and protected by the rules of law and equity. To improperly divert or unreasonably obstruct a water course is a private nuisance actionable at law. The jurisdiction of equity to interfere in such cases by injunctive relief, to prevent the diversion or obstruction or the continuance of the same when once established, to prevent irreparable damage, and avoid a multiplicity of suits at law, is clear and well established, the remedy at law being deemed inadequate.

United States.—Yates v. Milwaukee, 77 U. S. (10 Wall.) 497, 504, 19 L. Ed. 984, 986 (1870); Pumpelly v. Green Bay Co., 80 U. S. (13 Wall.) 166, 178, 20 L. Ed. 557, 560 (1871); Pine v. New York, 103 Fed. 337 (1900); California P. & A. Co. v. Enterprise C. & L. Co., 127 Fed. 741 (1903).

Alabama.—Stein v. Burden, 24 Ala. 130, 60 Am. Dec. 453 (1854); Stein v. Burden, 29 Ala. 127, 65 Am. Dec. 394 (1856); Ulbricht v. Eufaula Water Co., 86 Ala. 587, 6 So. 78, 11 Am. St. Rep. 72, 4 L. R. A. 572 (1888); Roberts v. Vest, 126 Ala. 355, 28 So. 412 (1900).

California.—Lux v. Haggin, 69 Cal. 255, 10 Pac. 674 (1886); Heilborn v. Last Chance Ditch Co., 75 Cal. 117, 17 Pac. 65 (1888); Heilborn v. Fowler Switch Canal Co., 75 Cal. 426, 17 Pac. 535, 7 Am. St. Rep. 183 (1888); Last Chance Ditch Co. v. Heilborn, 86 Cal. 1, 26 Pac. 523 (1890); Walker v. Emerson, 89 Cal. 456, 26 Pac. 968 (1891); Southern Cal. Imp. Co. v. Wilshire, 144 Cal. 68, 77 Pac. 767 (1904); Montecito Valley Water Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. 1113 (1904); Vestal v. Young, 147 Cal. 715, 82 Pac. 381 (1905); Huffner v. Sawday, 153 Cal. 86, 94 Pac. 424 (1908).

Connecticut.—Parker v. Griswold, 17 Conn. 288, 42 Am. Dec. 739 (1845); Harding v. Stanford Water Co., 41 Conn. 87 (1874); Adams v. Manning, 48 Conn. 477 (1881); Williams v. Wadsworth, 51 Conn. 277 (1883).

Georgia.—St. Amand v. Lehman, 120 Ga. 253, 47 S. E. 949 (1904).

Indiana.—Dilling v. Murray, 6 Ind. 324, 63 Am. Dec. 385 (1855).

Kansas.—City of Emporia v. Soden, 25 Kan. 588, 37 Am. Rep. 265 (1881); Atchison, T. & S. F. R. Co. v. Long, 46 Kan. 701, 27 Pac. 182, 26 Am. St. Rep. 165 (1891); Campbell v. Grimes, 62 Kan. 503, 64 Pac. 62 (1901).

Maine.—Blanchard v. Baker, 8 Me. (8 Greenl.) 253, 23 Am. Dec. 504 (1832); Fernald v. Knox Woolen Co., 82 Me. 48, 19 Atl. 93, 7 L. R. A. 459 (1889).

spring, and that the respondents had acquired the rights of riparian proprietors thereon, calling special attention to the statute (Ballinger's Ann. Codes & St., § 4114 [Pierce's Code, § 5829]), which gives to the owner of the land upon which a spring arises the use of the waters flowing therefrom, provided such owner can use the water upon his own premises. With regard to the statute, we are of the opinion that it has no application to a spring having a sufficient flow of water to form a water course. Such a stream is as inseparably annexed to the soil as is any other, and in consequence riparian proprietors thereon have the right to insist that the stream be permitted to flow as it is wont to flow by

Massachusetts.—Newhall v. Ireson, 62 Mass. (8 Cush.) 595, 54 Am. Dec. 790 (1851); Elliot v. Fitchburg R. Co., 64 Mass. (10 Cush.) 191, 57 Am. Dec. 85 (1852); Blood v. Nashua & L. R. Co., 68 Mass. (2 Gray) 137, 61 Am. Dec. 444 (1854); Potter v. Howe, 141 Mass. 357, 6 N. E. 233 (1886).

Michigan.—Dumont v. Kellogg, 29 Mich. 420, 18 Am. Rep. 102 (1874); Hilliker v. Coleman, 73 Mich. 170, 41 N. W. 219 (1889).

Minnesota.—Dorman v. Ames, 12 Minn. 451 (1866); Bennett v. Murtagh, 20 Minn. 153 (1873).

Mississippi.—Ferris v. Wellborn, 64 Miss. 29, 8 So. 165 (1886).

Nebraska.—Cline v. Stock, 71 Neb. 70, 98 N. W. 454 (1904), 102 N. W. 265 (1905).

New Hampshire.—Burnham v. Kempton, 44 N. H. 78, 100 (1962); Ranlet v. Cook, 44 N. H. 512, 84 Am. Dec. 92 (1865); Roberts v. Clermont R. & L. Co., 73 N. H. 121, 59 Atl. 619 (1904).

New Jersey.—Lehigh Valley R. Co. v. Society for Establishing U. M., 30 N. J. Eq. (3 Stew.) 145 (1878); Spark Mfg. Co. v. Newton, 160 N. J. Eq. 399, 45 Atl. 596 (1899).

New York.—Olmstead v. Loomie, 9 N. Y. 424 (1854), reversing 6 Barb. (N. Y.) 152 (1849); Brown v. Bowen, 30 N. Y. 519, 86 Am. Dec. 406 (1864); Pixley v. Clark, 35 N. Y. 520, 91 Am. Dec. 72 (1866); Corning v. Troy I. & N. Factory, 40 N. Y. 191 (1869); Comstock v. Colenson, 46 N. Y. 615 (1871); Markham v. Stowe, 66 N. Y. 574 (1876); Garwood v. New York Cent. & H. River R. Co., 83 N. Y. 400, 38 Am. Rep. 452 (1882); Smith v. Rochester, 92 N. Y. 463, 44 Am. Rep. 393 (1883); Groat v. Moak, 94 N. Y. 115 (1883); Mudge v. Salisbury, 110 N. Y. 413, 18 N. E. 249 (1888); New York Rubber Co. v. Rothery, 132 N. Y. 293, 30 N. E. 841, 28 Am. St. Rep. 575 (1892); Amsterdam Knitting Co. v. Dean, 162 N. Y. 278, 56 N. E. 757 (1900); Strobel v. Kerr Salt Co., 164 N. Y. 303, 323, 21 Mor. Min. Rep. 38, 58 N. E. 142, 79 Am. St. Rep. 643, 51 L. R. A. 687 (1900); Gallagher v. Kingston Water Co., 25 App. Div. 82, 49 N. Y. Supp. 250 (1898); Penrhyn Slate Co. v. Grandville, E. L. & P. Co., 84 App. Div. 92, 82 N. Y. Supp. 547 (1903); Van Hoesen v. Coventry, 10 Barb. 518 (1851); Patterson v. Richards, 22 Barb. 143 (1856); Reid v. Grifford, Hopk. Ch. 416 (1825); People v. Platt, 17 Johns. 195, 211 (1819); Hooker v. Cummings, 20 Johns. 90, 11 Am. Dec. 249 (1822); Gardner v. Newbourgh, 2 Johns. Ch. (N. Y.) 161, 7 Am. Dec. 526 (1816); Samuels v. Armstrong, 46 Misc. 481, 93 N. Y. Supp. 24 (1905); Varick v. Smith, 5 Paige Ch. 143, 28 Am. Dec. 417 (1835); Crooker v. Bragg, 10 Wend. (N. Y.) 260, 25 Am. Dec. 555 (1833).

Oregon.—Weiss v. Oregon Iron & S. Co., 13 Or. 496, 11 Pac. 255 (1886); Tucker v. Salem Flouring-Mills Co., 15 Or. 581, 16 Pac. 426 (1888); Watts v. Spencer, 51 Or. 262, 94 Pac. 39 (1908)

nature, without material diminution or altering, save where the right to divert is acquired by grant, prescription, or prior appropriation. In other words, water flowing in a natural water course which arises from a spring is not different with respect to the rights of riparian proprietors along the stream than is water flowing through such a course arising from any other source. What might be the rights of parties with respect to springs which do not create a water course we are not called upon here to decide, and do not decide, but with streams of the character here in question we hold that the common-law rule relating to riparian proprietors applies.

Pennsylvania.—Wheatley v. Chrisman, 24 Pa. St. 298, 11 Mor. Min. Rep. 24, 64 Am. Dec. 657 (1855); Erie Canal Co. v. Walker, 29 Pa. St. 170 (1857); Messinger's App., 109 Pa. St. 285 (1885); Pennsylvania R. Co. v. Miller, 112 Pa. 34, 3 Atl. 780 (1886).

Rhode Island.—Olney v. Fenner, 2 R. I. 211, 57 Am. Dec. 711 (1852).

South Carolina.—Royster Guano Co. v. Fowles, 75 S. C. 434, 56 S. E. 11 (1906).

Tennessee.—Webster v. Harris, 111 Tenn. 668, 69 S. W. 782, 59 L. R. A. 324 (1902).

Texas.—Armendaiz v. Stillman, 67 Tex. 458, 3 S. W. 678 (1887); Santa Rosa Irr. Co. v. Pecos River Irr. Co. (Tex. Civ. App. Jan. 3, 1906), 92 S. W. 1014.

Utah.—Crescent Min. Co. v. Silver King Min. Co., 17 Utah 444, 468, 54 Pac. 244, 70 Am. St. Rep. 810 (1898).

Vermont.—Lyon v. McLaughlin, 32 Vt. 423 (1859); Fairhaven Marble Co. v. Adams, 46 Vt. 496 (1874); Sanborn v. Barley, 47 Vt. 170 (1873).

Virginia.—Hanna v. Clarke, 31 Gratt. (Va.) 36 (1878); Leonard v. St. John, 101 Va. 752, 45 S. E. 474 (1903).

West Virginia.—Chesapeake R. Co. v. Bobbett, 5 W. Va. 138 (1872).

Wisconsin.—Clark v. Stewart, 96 Wis. 154, 14 N. W. 54 (1882); Lawson v. Menasha Wooden-Ware Co., 59 Wis. 393, 18 N. W. 440, 48 Am. Rep. 528 (1884).

Equity has jurisdiction where irreparable injury is result of the obstruction or diversion of water. Ulbricht v. Eufaula Water Co., 86 Ala. 587, 6 So. 78, 11 Am. St. Rep. 72, 4 L. R. A. 572 (1888); Strait v. Brown, 16 Nev. 317, 40 Am. Rep. 479 (1881). See Burden v. Stein, 27 Ala. 104, 52 Am. Dec. 758 (1855); Olmstead v. Loomie, 9 N. Y. 428 (1854), reversing 6 Barb. 152 (1849); Coming v. Troy I. & N. Factory, 40 N. Y. 191, 207 (1869); Gardner v. Newburgh, 2 Johns. Ch. (N. Y.) 161, 7 Am. Dec. 526 (1816); Pumpelly v. Green Bay Co., 80 U. S. (13 Wall) 166, 178, 20 L. Ed. 557, 560 (1870).

Thus, where a person had an easement or grant of privilege to draw water from a spring on property of another, through a pipe of designated diameter, he was enjoined from using a larger pipe and taking more water. Markham v. Stowe, 66 N. Y. 574 (1876).

Where a railroad company, in the construction of its road across a natural water course, covers up a spring from which a part of the supply of water issues, building a large embankment, and by other means totally diverts the waters from the land of a person through whose land the water naturally flowed before the construction of the road, such person is entitled to a mandatory injunction against the railroad company. Atchison T. & S. F. R. Co. v. Long, 46 Kan. 701, 27 Pac. 182, 26 Am. St. Rep. 169 (1891).

2. Joinder of Parties Plaintiff.

Right of parties injured to unite as plaintiffs in action. See Scofield v. Lan-

It becomes, therefore, material to inquire what rights the respondents have to the stream in question considered as riparian proprietors. It is said by the appellant that since the channel in which the spring now flows is artificial with respect to the waters of the spring, the respondents must base their denial of the right of the appellant to return it to its original channel upon one or both of two grounds, namely, that they have acquired a right by prescription to have the water flow through this channel, or that the appellant is now estopped to assert the right to return the water to its natural channel; and he argues that respondents have no right by prescription, and are in no position to urge an estoppel

sing, 17 Mich. 437, 444 (1868); Middleton v. Flat Fork B. Co., 27 Mich. 533 (1873); Watkins v. Peck, 13 N. H. 360, 40 Am. Dec. 156 (1843); Simar v. Canady, 53 N. Y. 298, 13 Am. Rep. 523 (1873); Murray v. Hay, 1 Barb. Ch. (N. Y.) 59, 43 Am. Dec. 773 (1845); Reid v. Gifford, 1 Hopk. Ch. (N. Y.) 416 (1825); Williams v. County Court, 26 W. Va. 488, 53 Am. Rep. 94 (1885).

3. Estoppel by Delay.

Any delay in bringing suit short of statutory period of limitation will not estop a proprietor who is injuriously affected from maintaining suit for injunction. California P. & A. Co. v. Enterprise C. & L. Co., 127 Fed. 741 (1903), following Lux v. Haggin, 69 Cal. 256, 391, 10 Pac. 674 (1886), and distinguishing Curtiss v. La Grande Hydraulic Water Co., 20 Or. 34, 23 Pac. 808, 25 Pac. 378, 10 L. R. A. 484 (1890). See Williams v. Wadsworth, 51 Conn. 277 (1883).

Thus, it has been held that where the owner of the premises on which a spring arises wrongfully appropriates it to injury of a lower proprietor, the injury is continuous, and is not referable to the date on which the original wrong was committed, and the fact that the date of the original wrong is beyond the statute of limitations will not prevent a recovery of damages which have occurred within the statute of limitations. Colrick v. Swinburne, 105 N. Y. 503, 12 N. E. 427 (1887). See Arnold v. Hudson River R. Co., 55 N. Y. 662 (1874), reversing 49 Barb. 108 (1867); Uline v. New York C. & H. River R. Co., 101 N. Y. 98, 4 N. E. 536, 54 Am. Rep. 661 (1886); Waggoner v. Jermaine, 3 Denio. (N. Y.) 306 (1846); Thayer v. Brooks, 17 Ohio 489, 49 Am. Dec. 474 (1848); Bare v. Hoffman, 79 Pa. St. 71, 21 Am. Rep. 42 (1875).

4. When Granted.

Injunction is a preventive remedy, not given for past injury, but for prevention of continuance only. Cobb v. Smith, 16 Wis. 692 (1863); Lawson v. Menasha Wooden-Ware Co., 59 Wis. 393, 18 N. W. 440, 48 Am. Rep. 528 (1884).

Injunction against diversion of water will not be granted where no diversion is shown. Last Chance Ditch Co. v. Heilborn, 86 Cal. 1, 26 Pac. 523 (1890).

It is not every injury or invasion of right in water that will entitle proprietor to maintain action for injunction. See Dilling v. Murray, 6 Ind. 324, 63 Am. Dec. 385 (1855); Elliot v. Fitchburg R. Co., 64 Mass. (10 Cush.) 191, 57 Am. Dec. 85 (1852); Palmer v. Mulligan, 3 Cai. (N. Y.) 307, 2 Am. Dec. 270 (1855—Kent, C. J., and Thompson, J., dissenting). But compare, Blood v. Nashua & L. R. Co., 68 Mass. (2 Gray) 137, 61 Am. Dec. 444 (1857).

Mandatory injunction issues only when a court of law cannot grant adequate relief, or where full compensation cannot be made in pecuniary damages. Atchison, T. & S. F. R. Co. v. Long, 40 Kan.

against him. In regard to these contentions, we agree with the appellant that the respondents have no right by prescription based on their own use of the water, as it is clear there has been no such continuous use for the statutory period as would ripen into such a right; but we think they can successfully urge an estoppel. The appellant and his predecessors in interest have made this the channel for the overflow of the spring for more than thirty years. The respondents, relying on its continued flow therein, have acquired the land bordering on the stream and made valuable improvements thereon, which will become valueless if the water is now returned to its original channel. Equity and good conscience

701, 27 Pac. 182, 26 Am. St. Rep. 165 (1891).

The mere fact that a legal remedy exists will not be a bar to equitable interference where it would be more adequate, comprehensive, and effectual. See Bemis v. Upham, 30 Mass. (13 Pick.) 169 (1832); Boston W. P. Co. v. Boston & W. R. Co., 33 Mass. (16 Pick.) 512, 521 (1835); Ballou v. Hopkinton, 70 Mass. (4 Gray) 324, 328 (1855); Lawson v. Menasha Wooden-Ware Co., 59 Wis. 393, 18 N. W. 440, 48 Am. Rep. 528 (1884).

In those cases, however, where the proprietor is taking no advantage of his usufructuary right, but allows the water to flow unutilized, and it appears to be of no special value to him at the time, he will not be permitted to call for equitable interference in his behalf further than to vindicate his right and to prevent a loss of it by adverse user and lapse of time. A court of equity will exercise its discretion in such cases, not to interfere by injunction, but leave the party to remedy at law. Ulbricht v. Eufaula Water Co., 86 Ala. 587, 6 So. 78, 11 Am. St. Rep. 72, 4 L. R. A. 572 (1888); Corning v. Troy I. & N. Factory, 40 N. Y. 207, 220 (1869); Clinton v. Meyers, 64 N. Y. 511, 7 Am. Rep. 373 (1871); Smith v. City of Rochester, 92 N. Y. 463, 44 Am. Rep. 393 (1883).

5. Proof of Damages.

The riparian proprietor must show perceptible damages. Elliot v. Fitchburg R. Co., 64 Mass. (10 Cush.) 191, 27 Am. Dec. 85 (1852). See Blanchard v. Baker, 8 Me. (8 Greenl.) 253, 23 Am. Dec. 504, (1832); Anthony v. Lapham, 22 Mass. (5 Pick.) 175 (1827); Van Hoesen v. Coventry, 10 Barb. (N. Y.) 518 (1851); Tyler v. Wilkinson, 4 Mason, 397, Fed. Cas. No. 14,312 (1827); Webb v. Portland Mfg. Co., 3 Sumn. 189, Fed. Cas. No. 17,322 (1838).

Injunction may be maintained although proprietor sustains no present damage, where the injury is of such a nature that it is continuous and may ripen into right or title. Vestal v. Young, 147 Cal. 715, 82 Pac. 816 (1905); Newhall v. Ireson, 62 Mass. (8 Cush.) 595, 54 Am. Dec. 790 (1851); Lund v. New Bedford, 121 Mass. 286, 290 (1876); Garwood v. New York Cent. & H. River R. Co., 83 N. Y. 400, 38 Am. Rep. 452 (1880); Lawson v. Menasha Wooden-Ware Co., 59 Wis. 393, 18 N. W. 440, 48 Am. Rep. 528 (1884); Webb v. Portland Mfg. Co., 3 Sumn. 189, Fed. Cas. No. 17,322 (1838). See Moore v. Clear Lake Water Co., 68 Cal. 146, 8 Pac. 816 (1885); Conkling v. People, 87 Cal. 296, 25 Pac. 399 (1890); Walker v. Emerson, 89 Cal. 456, 26 Pac. 968 (1891); Ewing v. Mott, 90 Cal. 231, 27 Pac. 194 (1891); Henne v. Lankershim, 146 Cal. 70, 79 Pac. 591 (1905).

A proprietor is entitled to damages for any disturbance of his right, without proof of actual damage. It is the invasion of the right which gives the action; and the law in the absence of

therefore require that the artificial channel be regarded as the natural channel, and the plaintiff should not be permitted to assert the contrary for his own benefit and the respondents' injury. The rule governing such cases is well stated by this court in the case of Matheson v. Ward, 24 Wash. 407, 64 Pac. 520, 85 Am. St. Rep. 955. In that case it was made to appear that the Dungeness River some four miles south of its mouth originally divided into three channels, the east channel, known as "Hurd's Creek Channel," the center or main channel, known as the "East Channel," and the one further west, known as the "West Channel." Some time prior to the year 1865, some person built a wing dam across the West Channel, which had the effect of diverting all the water

evidence of special injury, gives nominal damages on the ground that the undisturbed enjoyment and continuance of such wrongful action without the consent of the complaining proprietor would ripen into evidence of the right to do the act complained of and becomes the foundation of adverse right or title.

United States.—Webb v. Portland Mfg. Co., 3 Sumn. 189; Fed. Cas. No. 17,322 (1838).

Alabama.—Stein v. Burden, 24 Ala. 130, 60 Am. Dec. 453 (1854), 27 Ala. 104, 62 Am. Dec. 758 (1855), and 29 Ala. 127, 65 Am. Dec. 394 (1856); Ulbricht v. Eufaula Water Co., 86 Ala. 587, 6 So. 78, 11 Am. St. Rep. 72, 4 L. R. A. 572 (1888).

California.—Parke v. Kilham, 8 Cal. 77, 4 Mor. Min. Rep. 522, 68 Am. Dec. 310 (1857); Ferrea v. Knipe, 28 Cal. 340, 87 Am. Dec. 128 (1865); Moore v. Clear Lake W. W., 68 Cal. 146, 8 Pac. 816 (1885); Lux v. Haggin, 69 Cal. 255, 10 Pac. 674 (1886); Stanford v. Felt, 71 Cal. 249, 16 Pac. 900 (1886); Heilborn v. Fowler Switch Canal Co., 75 Cal. 426, 17 Pac. 535, 7 Am. St. Rep. 183 (1888).

Connecticut.—Parker v. Griswold, 17 Conn. 288, 42 Am. Dec. 739 (1845).

Maine.—Blanchard v. Baker, 8 Me. (8 Greenl.) 253, 23 Am. Dec. 504 (1832).

Massachusetts.—Bliss v. Rice, 34 Mass. (17 Pick.) 23 (1835); Newhall v. Ireson, 62 Mass. (8 Cush.) 595, 54 Am. Dec. 790 (1851).

New York.—Crooker v. Bragg, 10 Wend. (N. Y.) 260, 25 Am. Dec. 555 (1833).

Pennsylvania.—Ripka v. Sergeant, 7 Wats. & S. (Pa.) 9, 42 Am. Dec. 214 (1844).

This doctrine is based upon two grounds: (1) that every injury, from its very nature, legally implies to damage; and, (2) that any injury to a right is a damage to person entitled to that right, by jeopardizing its continuance and leading to its very destruction. Parker v. Griswold, 17 Conn. 288, 42 Am. Dec. 739 (1845).

6. Nominal Damages.

In an action to restrain diversion of waters and for damages, courts may grant injunction though only nominal damages are shown. Fischer v. Trustees Village of Clifton Springs, 121 N. Y. Supp. 163 (1909); Amsterdam Knitting Co. v. Dean, 162 N. Y. 278, 56 N. E. 757 (1900); Samuels v. Armstrong, 46 Misc. (N. Y.) 481, 93 N. Y. Supp. 24 (1905).

Right to injunction to restrain diversion exists independently of the fact that the injury of the diversion is large in amount or serious in character. Pine v. New York, 103 Fed. 337 (1900). See Legg v. Horn, 45 Conn. 409 (1878); Dorman v. Ames, 12 Minn. 151 (1866); Corning v. Troy I. & N. Factory, 40 N. Y. 191 (1869); Gilzinger v. Saugerties Water Co., 142 N. Y. 633, 37 N. E. 566

of the stream into the East Channel and Hurd's Creek Channel. In 1895, after the water had been confined to the East and Hurd's Channels for nearly thirty years, certain persons living along these channels again opened up the West Channel, and dammed the others, so as to divert almost the entire flow of the river into the West Channel. In 1900 owners of land along the West Channel attempted to again confine the waters to the East and Hurd's Channels, when the persons who had diverted it in 1895 brought an action to restrain them from so doing. The trial court denied the injunction, and its judgment was affirmed in this court. In the course of the opinion we said: "Much evidence is quoted by

(1894); affirming 66 Hun 171, 21 N. Y. Sup. 121 (1892); Amsterdam Knitting Co. v. Dean, 162 N. Y. 278, 56 N. E. 757 (1900).

Although injury to riparian owner by invasion of his right is slight or trifling, he is entitled to injunction restricting diversion of water. Penrhyn Slate Co. v. Grandville E. L. & P. Co., 84 App. Div. (N. Y.) 92, 82 N. Y. Sup. 547 (1903). See Corning v. Troy I. & N. Co., 40 N. Y. 191 (1869); Smith v. Rochester, 92 N. Y. 463, 44 Am. Rep. 393 (1883); New York Rubber Co. v. Rothery, 132 N. Y. 293, 30 N. E. 841, 28 Am. St. Rep. 575 (1892); Amsterdam Knitting Co. v. Dean, 162 N. Y. 278, 56 N. E. 757 (1900); Strobel v. Kerr Salt Co., 164 N. Y. 303, 323, 21 Mor. Min. Rep. 38, 58 N. E. 142, 79 Am. St. Rep. 643, 51 L. R. A. 687 (1900).

In the absence of any showing that special damages have been sustained or suffered, where a right is invaded or threatened, the party injured will be entitled to recover nominal damages as well as have injunctive relief, on the ground that the undisturbed enjoyment or continuation of acts complained of without the consent of the owner, would ripen into evidence of a right to do them. Stein v. Burden, 24 Ala. 130, 60 Am. Dec. 453 (1854), 27 Ala. 104, 62 Am. Dec. 758 (1855), 29 Ala. 127, 65 Am. Dec. 394 (1856); Ulbricht v. Eufaula Water Co., 86 Ala. 587, 1 So. 78, 11 Am. St. Rep. 72, 4 L. R. A. 572 (1888); Parke v. Kilham, 8 Cal. 77, 4 Mor. Min. Rep. 522, 68 Am. Dec. 310 (1857); Ferrea v. Knipe, 28 Cal. 340, 87 Am. Dec. 128 (1865); Moore v. Clear Lake W. W., 68 Cal. 146, 8 Pac. 816 (1885); Lux v. Haggin, 69 Cal. 255, 10 Pac. 674 (1886); Stanford v. Felt, 71 Cal. 249, 16 Pac. 900 (1886); Heilborn v. Fowler Switch Canal Co., 75 Cal. 426, 17 Pac. 535, 7 Am. St. Rep. 183 (1888); Newhall v. Ireson, 62 Mass. (8 Cush.) 595, 54 Am. Dec. 790 (1851). This doctrine is based upon two grounds: (1) that every injury, from its very nature, legally implies damage; and, (2) that an injury to a right is a damage to the person entitled to that right, by jeopardizing its continuance and leading to its very destruction. Parker v. Griswold, 17 Conn. 288, 42 Am. Dec. 739 (1845).

7. Damages Incapable of Ascertainment.

A proprietor is entitled to injunction although the injury caused by diversion is incapable of ascertainment, or of a nature that cannot be computed by any pecuniary standard. Heilborn v. Fowler Switch Canal Co., 75 Cal. 426, 17 Pac. 535, 7 Am. St. Rep. 183 (1888). See Parke v. Kilham, 8 Cal. 77, 4 Mor. Min. Rep. 522, 68 Am. Dec. 310 (1857); Ferrea v. Knipe, 28 Cal. 340, 87 Am. Dec. 128 (1865); Moore v. Clear Lake W. W., 68 Cal. 146, 8 Pac. 816 (1885); Lux v. Haggin, 69 Cal. 255, 10 Pac. 674 (1886); Stanford v. Felt, 71 Cal. 249, 16 Pac. 900 (1886); Wilson v. Mineral

appellants in their brief to the effect that many years ago there was a natural channel in the west, and that one Le Balister, in 1865, closed up this channel by a dam, and that thereafter it filled up by sediment and brush, and no water ran through it at low and ordinary high water. Conceding this to be true, viz., that prior to 1865 it was a natural channel, although the evidence is conflicting upon this point, the admissions already stated make the determination of the question one of law for the court, rather than one of fact. Even if the West Channel was a natural channel prior to 1865, and was then dammed up, and the water diverted to the East and Hurd's Creek Channels, where it was confined for thirty years,

Point, 39 Wis. 160 (1875); Lawson v. Menasha Wooden-Ware Co., 59 Wis. 393, 18 N. W. 440, 48 Am. Rep. 528 (1884).

The right to an injunction does not depend upon the existence of damages measured by money standard; the maxim *de minimis* does not apply. Learned v. Castle, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11 (1889); Walker v. Emerson, 89 Cal. 456, 26 Pac. 968 (1891).

Where a right is invaded or threatened, which invasion is necessarily to be operative prospectively, and the existence of injuries is contingent and doubtful of ascertainment, a preliminary injunction is the appropriate remedy. Lyon v. McLaughlin, 32 N. H. 423 (1859).

8. Damages Presumed from Invasion of Right.

Damage is presumed from diversion; otherwise, before a party might be able to prove actual damage, the wrongdoer might acquire right by prescription or upon presumption of grant. Thus an injury is likely to ensue from such an invasion of right which is sufficient damage to sustain an action for the recovery of nominal damages at least, and so establish plaintiff's right. Plumleigh v. Dawson, 6 Ill. (1 Gilm.) 544, 41 Am. Dec. 199 (1844). See Webb v. Portland Mfg. Co., 3 Sumn. 189, Fed. Cas. No. 17,322 (1838); Parker v. Griswold, 17 Conn. 288, 42 Am. Dec. 739 (1845); Blanchard v. Baker, 8 Me. (8 Greenl.) 253, 23 Am. Dec. 504 (1832); China v. Southwick, 12 Me. 238 (1835); Bolivar Mfg. Co. v. Neponset Mfg. Co., 33 Mass. (16 Pick.) 241 (1834); Garwood v. N. Y. Cent. & H. River R. Co., 83 N. Y. 400, 38 Am. Rep. 452, (1880—distinguishing on this point Elliot v. Fitchburg R. Co., 64 Mass., 10 Cush., 191, 57 Am. Dec. 85—1852); Gardner v. Newburgh, 2 John. Ch. (N. Y.) 162, 7 Am. Dec. 526 (1816); Crooker v. Bragg, 10 Wend. (N. Y.) 260, 25 Am. Dec. 555 (1833); Pastorius v. Fisher, 1 Rawle. (Pa.) 27 (1828).

9. Decreeing Damages by Decree of Injunction.

Equity will not do justice by halves, but will render full and complete relief in determining the rights of the parties within the scope of pleadings. Royster Guano Co. v. Fowles, 75 S. C. 434, 56 S. E. 11 (1906). See Phillips v. Anthony, 47 S. C. 463, 25 S. E. 294 (1896); Butler v. Butler, 67 S. C. 212, 45 S. E. 184 (1903); Hanna v. Clarke, 31 Grat. (Va.) 36 (1878).

A court of equity has power by decree to ascertain and order payment of damages by decree of injunction. Pine v. New York, 103 Fed. 337 (1900). See Ferris v. Dudley, 78 Ala. 124, 56 Am. Rep. 23 (1884); Roberts v. Vest, 126 Ala. 355, 28 So. 412 (1900); Stowers v. Gilbert, 156 N. Y. 600, 51 N. E. 282 (1898); Stadler v. Grieben, 61 Wis. 500, 21 N. W. 629 (1894); Lake Hotel Co. v. Cedar Creek Hydraulic Co., 79 Wis. 297, 48 N. W. 371 (1891).

and this flow was acquiesced in by the riparian owners and others along the channels of said river, this would make the East and Hurd's Creek the natural channels; and defendants and others purchasing and improving lands along the old channel, and relying upon the flow continuing in the channels thereby formed, could not now have their lands damaged by reason of the water being turned back by artificial means after that lapse of time. After the lapse of thirty years the channels known as the 'East' and 'Hurd's Creek' became natural channels and the attempt of riparian or other owners to change the flow at this late day to the injury of persons on the old channel would be unlawful. According to the evidence, it is probably true that in the year 1865, one Le Balister, by means of a dam or embankment, changed the flow of water out of the West Channel. Conceding it to be so the acquiescence by plaintiffs and their grantors and all riparian owners below the point of divergence for

IV. Artificial Channels Becoming Natural Channels.

A. As to, Generally.

In the principal case there was a changing of the natural flow of the water to an entirely new course by means of an artificial channel. The fact that the source of the water forming the stream thus diverted into a new course originated in a spring on the premises of the diverting proprietor is of no significance. The general rules of law relating to the diversion of streams is applicable; and the question involved is as to when, in law, the artificial channel is regarded as the natural channel of the stream, carrying all the rights and interests attaching to and adhering in a natural permanent stream.

Riparian rights do not usually attach to artificial channels. Fox River F. & P. Co. v. Kelly, 70 Wis. 298, 35 N. W. 542 (1887); Ligare v. Chicago, M. & N. R. Co., 166 Ill. 249, 46 N. E. 803 (1897). Adverse use of water flowing through an artificial channel for a period of twenty years is presumptive evidence of a grant to use the same. Watkins v. Peck, 13 N. H. 360, 40 Am. Dec. 156 (1843). This is on the ground that such right is an easement, and that an easement may be acquired by prescription. See Johnson v. Jordan, 43 Mass. (2 Metc.) 234, 37 Am. Dec. 85 (1841); Worrall v. Rhoades, 2 Whart. (Pa.) 427, 30 Am. Dec. 274 (1837); Simms v. Davis, 1 Cheves (S. C.) L. 1, 34 Am. Dec. 581 (1839). But it has been held that while the right to the use of water flowing in an artificial channel may be acquired by prescription, no correlative right can thereby be acquired so that the one benefited by the discharge of the water can insist on its continuance. Norton v. Volentine, 14 Vt. 246, 39 Am. Dec. 220 (1842).

An artificial channel or ditch constructed by landowners to carry off the waters from heavy rains and melting snows, is not a water course. New Jersey I. & I. R. Co. v. Tutt, 168 Ind. 205, 80 N. E. 420 (1907); Burton v. Jenson, 9 Ohio Dec. 120, 11 Cen. L. Bul. 26; Lawton v. South Bound R. Co., 61 S. C. 548, 554, 39 S. E. 752 (1901); Fryer v. Warne, 29 Wis. 511, 515 (1872). And cannot be invested with the characteristics of a natural water course by any lapse of time. Lawton v. South Bound R. Co., 61 S. C. 548, 554, 39 S. E. 752 (1901).

An artificial sluiceway over reclaimed flats, along which the tide ebbs and flows, is not a water course within the meaning of the law. Water may flow into it and flow out again, but it does not therein

a period of thirty years has now lost them the right to change the flow from the new into the old channel." To the same effect is Shepardson v. Perkins, 58 N. H. 354, where the court used the following language: "If the landowner, having changed the direction of the natural stream through his land, were to suffer others who are entitled to use the water to expend money in reference to such use, under a belief that the new channel was to be permanent, and this were known to him, he could not afterwards change its course so as to injure the party who had expended his money. In these and like cases, whenever one who owns a water course in which another is interested, or by the use of which another is affected, does any act or suffers any act to be done affecting the rights of other proprietors, whereby a state of things is created which he cannot change without materially injuring another who has been led to act by what he himself had done or permitted, the court applies the doctrine of

pursue a course. There is no stream of water passing through it in the sense of a water course. Chamberlain v. Hemingway, 63 Conn. 1, 27 Atl. 239, 8 Am. St. Rep. 330, 22 L. R. A. 45 (1893).

A natural water course does not cease to be such by reason of the fact that its channel is artifically deepened to facilitate the flow, or for the purpose of drainage. Cleveland, C., C. & St. L. R. Co. v. Huddleston, 21 Ind. App. 621, 52 N. E. 1008, 69 Am. St. Rep. 385 (1899).

B. Canals May Become, When.

A canal can never come under the designation of a natural water course unless it is a mere enlargement of a natural water course. Porter v. Armstrong, 129 N. C. 101, 39 S. E. 799 (1901).

As to canals for drainage of storm or surface waters not being water courses, see *ante* II, this note.

An artificial ditch to give direction to the flow of the current of a river is included in the term "natural water course." Stimson v. Brookline, 197 Mass. 568, 83 N. E. 893, 16 L. R. A. (N. S.) 280 (1908).

Where a ditch or canal was originally dug for the purpose of carrying a portion of a river, and the waters continued to flow through such canal or ditch for many years without change or objection, and it was such that it would have constituted a natural water course had the flow begun without artificial aid, it may be treated as a natural water course, and be subject to all the rules applicable to such a stream. Stimson v. Town of Brookline, 197 Mass. 568, 83 N. E. 893, 16 L. R. A. (N. S.) 820 (1908).

C. Conditions of Construction and Dedication.

An artificial water course may be created under such conditions that, so far as the rules of law and the rights of the public and of individuals are concerned, it is to be treated as if it were of natural origin. City of Reading v. Althouse, 93 Pa. St. 400 (1880); Weatherby v. Meiklejohn, 56 Wis. 73, 13 N. W. 697 (1882).

It is conceivable that the mere construction of a water course and dedication of property to that use by all the persons whose rights of property might be affected by the change, with acceptance by the public, if public interests were involved, might give these persons the same rights in it that they would have if it were a natural water course. Stimson v. Brookline, 197 Mass. 568, 83 N. E. 893, 16 L. R. A. (N. S.) 280 (1908).

equitable estoppel." And Mr. Gould says: "When a riparian owner has diverted the water into an artificial channel, and continued such change for more than twenty years, he cannot restore it to its natural channel to the injury of other proprietors along such channel who have erected works or cultivated their lands with reference to the changed condition of the stream. * * * " Gould on Waters (3d Ed.), § 225. These authorities maintain the principle that the proprietor of a stream by diverting it into an artificial channel, and suffering it to remain in its changed condition for a period of time exceeding the statute of limitations, is estopped as against a person making a beneficial use of the water from returning it to its natural channel to that person's loss and injury; that the user does not have to show a prescriptive right in himself, or a use by himself for the period of the statute of limitations in order to prevent its return. All he needs to show is that the person diverting it has suffered

Judge Cooley says that where a ditch is by common consent dug as a neighborhood drain, and has remained open as a water course for a series of years, it ought to be governed by the same rules that apply to other, i. e. natural, water courses. Freeman v. Weeks, 45 Mich. 335, 7 N. W. 904 (1881).

Where a landowner for the purpose of straightening a stream cuts a ditch through his land and over and along the highway, with the acquiescence and consent of all concerned, and turns the water into such new channel, it will thereafter be governed by the same rules as govern natural streams. Missouri Pac. R. Co. v. Keyes, 55 Kan. 205, 40 Pac. 275, 49 Am. St. Rep. 249 (1895).

D. Existence from Time Out of Mind.

The origin of an artificial stream being unknown, the circumstances may be such as to lead to the inference that the channel was constructed on the terms that the riparian proprietors should have the same rights as though it were a natural water course. Bailey & Co. v. Clark, Son & Morland [1902] 1 Ch. 664, 649-673.

Where it is impossible to tell the time of construction of the artificial part of a stream originating in a natural spring, the stream must be deemed to be a natural water course. Mostyn v. Atherton, [1899] 2 Ch. 360, 81 L. T. N. S. 356, 68 L. J. Ch. 629, 48 W. R. 168.

An artificial water ditch conducting water from a creek to the lands of a number of persons, and which has existed since time immemorial, is legally a natural water course. City of Reading v. Althouse, 93 Pa. St. 400, 405 (1880).

E. Prescriptive Use.

Prescriptive rights may be acquired in artificial water courses as well as in natural ones, where it appears the former are intended to be permanent instead of temporary, thus leaving room for a finding that their use by the party asserting prescription was not precarious and by way of license from the owner, but adverse. Ranney v. St. Louis & S. F. R. Co., 137 Mo. App. 537 (1909), 119 S. W. 484; Ellis v. St. Louis & S. F. R. Co. (Mo. App., May 25, 1909), 119 S. W. 489.

The principle is analogous to that under which other rights are acquired in real property by prescription or adverse use. Stimson v. Brookline, 197 Mass. 568, 83 N. E. 893, 16 L. R. A. (N. S.) 280 (1908).

After a long lapse of time, and even after no more than twenty years, if the

it to remain in its changed state for that period, and that he has made a beneficial use of the water relying upon the permanency of the change.

The court in its decree directed that the water flowing from the spring be divided so that forty per centum thereof should be permitted to flow down Gilmore Creek during the irrigating season of the year, and one-half thereof during other seasons. We are unable to find any basis in the record for this division of the water. While it appears that the appellant and his predecessors in interest had irrigated a five-acre tract lying immediately below the spring for a period of ten years and more and three acres of it practically for twenty-five years, and had irrigated parts of the meadow in section 12 intermittently for nearly as long, the record is silent as to the quantity of water thus required, or as to what part of the total flow was actually used. So also it is silent as to the proportion of the water flowing from the spring that was permitted to flow down Gilmore Creek, or what proportion of that which was thus permitted to flow the respondents actually used or required for irrigation

water course continue without change, with the acquiescence of the public authorities and of everybody interested, there is every reason, both upon principle and authority, for applying the same rules of law to an artificial channel as to a natural water course. Stimson v. Brookline, 197 Mass. 568, 83 N. E. 893, 16 L. R. A. (N. S.) 280 (1908).

Where the waters of a stream have been turned into an artificial channel, and have run therein for twenty years without objection, the proprietor of the land at the lower end of the channel making valuable improvements, relying upon the stream for a beneficial use, has the right of a riparian owner of a water course as against the owner of the upper end of the artificial channel, who has caused the waters to flow therein for twenty years. Shepardson v. Perkins, 58 N. H. 354 (1878).

A proprietor of land who for more than twenty-five years has conducted the waters of a spring in artificial channels, pursuing substantially the course of the natural flow of the waters, will be entitled to have the waters continue to flow in such channels. Miner v. Nichols, 24 R. I. 199, 52 Atl. 893 (1902).

A new channel was held to become the natural channel after the lapse of thirty years. Matheson v. Ward, 24 Wash. 407, 64 Pac. 520, 85 Am. St. Rep. 955 (1901).

Where the waters of a spring have been diverted into an artificial channel and permitted to flow there for more than thirty years, and third parties, relying on its continued flow therein, have acquired land bordering on the stream and made valuable improvements thereon which will become valueless after the water is returned to its original channel, equity and good conscience require that the artificial channel be regarded as the natural channel and the upper riparian proprietor will not be permitted to assert the contrary for his own benefit and to the injury of others. Hollett v. Davis, *supra*, principal case, following Matheson v. Ward, 24 Wash. 407, 64 Pac. 520, 85 Am. St. Rep. 955 (1901).

F. Estoppel.

Where water has been diverted by means of an artificial channel, lower riparian proprietors making a beneficial use of such water, have no right by prescription, based on their use, unless such

and domestic uses. No just division of the water can be made without knowledge of these matters, and hence we cannot in this court direct a final decree in the case, nor can we affirm the justness of the decree entered.

The decree appealed from will be reversed and the case remanded, with instructions to receive such further evidence as the parties may desire to offer on the line above indicated as will enable the court to make a just division of the water between them, and thereafter to enter a decree accordingly.

RUDKIN, C. J., and CHADWICK, GOSE, DUNBAR, and CROW, JJ., concur.

use has been continuous for the statutory period; but where they have made valuable investments and improvements with reference to such water, they can successfully urge an estoppel of the upper riparian proprietor. Hollett v. Davis, *supra*, principal case.

Where a proprietor by means of an artificial channel changes the course of a stream flowing through his property, and another has purchased land and made improvements lower down on the stream in its new position, on the faith that the new channel will be permanent, and the water continues to flow in the new channel for the prescriptive period, the proprietor making the change will not be permitted to restore the stream to its original channel. Smith v. Musgrove, 32 Mo. App. 241 (1888).

G. For Temporary Use or Personal Convenience Only.

When an artificial water way is intended to exist only so long as suits the purposes of him who makes it through his lands, even a riparian proprietor cannot acquire an easement as against him. Ranney v. St. Louis & S. F. R. Co., 137 Mo. App. 537 (1909), 119 S. W. 484; Ellis v. St. Louis & S. F. R. Co. (Mo. App., May 25, 1909), 119 S. W. 489.

It has been held that where the waters of a spring have been diverted for purposes of consumption, and the artificial channel has been extended through the lands of another for the purpose of carrying off the surplus waters in times of rains, he acquires no right to the continuance of the channel. Mitchell v. Parks, 26 Ind. 354 (1866).

ZIMMERMAN et al. v. FUNCHION et al.

[Circuit Court of Appeals, Ninth Circuit, May 24, 1908.]

89 C. C. A. 53, 161 Fed. 859.

1. Mines and Mining—Placer Claims—Excessive Location, Effect.

A placer claim location exceeding the statutory twenty acres does not render the entire claim void; it is void as to excess only.

2. Same—Selection of Discard.

The prior locator in actual possession of a placer claim which exceeds the legal limitation, and diligently working the same in good faith, may select what portion of the claim he will discard as excess (following McIntosh v. Price, 121 Fed. 716, 58 C. C. A. 136).

3. Same—Subsequent Locator's Right to Select Excess.

Where the prior locator, who is not in actual possession of the claim containing an excess over the legal limitation, knowingly refuses or neglects to draw in his lines to the legal limit, any other prospector may take the excess within another location from any part of such prior excessive location (raised but not decided).

Error to District Court of the United States for the Territory of Alaska, Third Division.

Action in ejectment. Judgment for plaintiffs in court below. Defendants appealed. Affirmed.

For plaintiffs in error—McGinn & Sullivan, J. C. Campbell, W. H. Metson, F. C. Drew, C. H. Oatman, and J. A. MacKinzie.

CASE NOTE.

Excessive Location of Mining Claim.

1. Honest Mistake in Locating Boundaries.

A. General Rule.

The general rule is that where an excessive location is made through mistake, while acting in good faith, as where the locator sets his stakes and estimates his distances without chain or compass, the location is valid as to the amount of ground the locator is entitled to claim, and void as to excess only.

United States.—Richmond Min. Co. v. Rose, 114 U. S. 576, 29 L. Ed. 273, 5 Sup. Ct. 1055 (1885), affirming Rose v. Richmond Min. Co., 17 Nev. 25, 27 Pac. 1105 (1882); Glacier Mt. S. Min. Co. v. Willis, 127 U. S. 471, 481, 32 L.

For defendants in error—T. C. West.

ROSS, Circuit Judge. This was an action of ejectment tried before the court below by stipulation of the parties, without a jury, and resulted in findings and judgment for the plaintiffs, who are the defendants in error here. The subject of the action is a strip of mining ground in the Fairbanks mining district of Alaska, covered by Creek Placer Mining Claim No. 6, above Discovery, on Dome Creek, under which the defendants in error claim; and by Bench Claim No. 6, First Tier Right Limit of Dome Creek, under which the plaintiffs in error claim. It is undisputed that the Creek claim was the prior location, it having been located by Funchion on the 17th day of September, 1902, for one John C. Ross, to whose interest Funchion and his codefendant in error succeeded prior to the bringing of the action. The bench claim was located May 12, 1904, by Zimmerman. It turned out that the placer claim, as a matter of fact, contained 21.7 acres—an excess of 1.7 acres over the legal limit of 20 acres prescribed by statute for placer claims. It is well settled that the excess did not render the entire Creek claim void, but that it was void only as to the excess. Jupiter Mining

Ed. 174, 8 Sup. Ct. 1214, 17 Mor. Min. Rep. 127 (1888); Parley's Park S. Min. Co. v. Kerr, 130 U. S. 256, 32 L. Ed. 906, 9 Sup. Ct. 511 (1889), 17 Mor. Min. Rep. 201; Eureka Consol. Min. Co. v. Richmond Min. Co., 4 Sawy. 302, Fed. Cas. No. 4,548, 9 Mor. Min. Rep. 578 (1877); North Noonday Min. Co. v. Orient Min. Co., 1 Fed. 522, 6 Sawy. 299, 9 Mor. Min. Rep. 529 (1880); Jupiter Min. Co. v. Bodie Consol. Min. Co., 11 Fed. 666, 7 Sawy. 96 (1881), 4 Mor. Min. Rep. 411; Lakin v. Dolly, 53 Fed. 333 (1891); Doe v. Waterloo Min. Co., 54 Fed. 935, 941 (1893); McIntosh v. Price, 121 Fed. 716, 58 C. C. A. 136 (1903); Walton v. Wild Goose Min. & T. Co., 123 Fed. 209, 218, 60 C. C. A. 164, 22 Mor. Min. Rep. 688 (1903); Zimmerman v. Funchion, 161 Fed. 859 (1908), the principal case; Waskey v. Hammer, 170 Fed. 31 (1909), see the case in volume 2, this series.

Alaska.—Pratt v. United Alaska Min. Co., 1 Alaska 95 (1900); Price v. McIntosh, 1 Alaska 286, 291 (1901).

California.—English v. Johnson, 17 Cal. 107, 12 Mor. Min. Rep. 202, 76 Am. Dec. 574 (1860); Thompson v. Spray, 72 Cal. 528, 14 Pac. 182 (1887); Doe v. Tyler, 73 Cal. 21, 14 Pac. 375 (1887); Doe v. Sanger, 83 Cal. 203, 17 Mor. Min. Rep. 298, 23 Pac. 365 (1890); Howeth v. Sullinger, 113 Cal. 547, 45 Pac. 841 (1896); Sherman v. Wrinkle, 121 Cal. 503, 53 Pac. 1090, 54 Pac. 270 (1898); Conway v. Hart, 129 Cal. 480, 62 Pac. 44, 21 Mor. Min. Rep. 20 (1900); McElligott v. Krogh, 151 Cal. 126, 90 Pac. 823 (1907).

Colorado.—Patterson v. Hitchcock, 3 Colo. 533, 5 Mor. Min. Rep. 542 (1877); Taylor v. Parenteau, 23 Colo. 368, 18 Mor. Min. Rep. 534, 48 Pac. 505 (1897). See, also, Wolfley v. Lebanon Min. Co., 4 Colo. 112, 13 Mor. Min. Rep. 282 (1878).

Idaho.—Atkins v. Hendree, 1 Idaho 107, 1 Idaho (West Ed.) 95; 2 Mor. Min. Rep. 328 (1867); Stem-Winder Min. Co. v. Emma & L. C. Consol. Min. Co., 2 Idaho 421, 2 Idaho 456, 21 Pac. 1040 (1889); affirmed 149 U. S. 787, 37 L. Ed. 941, 13 Sup. Ct.

Co. v. Bodie Consol. Min. Co., 11 Fed. 666, 4 Mor. Min. Rep. 411; English v. Johnson, 17 Cal. 107, 108, 12 Mor. Min. Rep. 202, 76 Am. Dec. 574; Thompson v. Spray, 72 Cal. 528, 14 Pac. 182; Howeth v. Sullenger, 113 Cal. 547, 45 Pac. 841; Patterson v. Hitchcock, 3 Colo. 533, 5 Mor. Min. Rep. 542; Taylor v. Parenteau, 23 Colo. 368, 18 Mor. Min. Rep. 534, 48 Pac. 505; Hansen v. Fletcher, 10 Utah 266, 37 Pac. 481; McPherson v. Julius, 17 S. Dak. 98, 95 N. W. 435; McElligott v. Krogh, 151 Cal. 126, 90 Pac. 825; Lindley on Mines, § 362; Snyder on Mines, § 398.

In McIntosh v. Price, 121 Fed. 716, 58 C. C. A. 136, we held, and rightly held, that where a prior locator is in the actual possession of a claim which as a matter of fact exceeds the legal limit of 20 acres, and is diligently working the same in good faith, he is at liberty to elect what portion of the claim he will reject as the excess, saying:

"We are very clearly of the opinion that if any portion of the ground located by the Kjelsbergs was subject to relocation as being in excess of the permitted width the owners thereof in possession under the circumstances found by the trial court could not be deprived of the right to select the portion thereof which they would elect to hold, and that another locator had no right to enter upon that portion of the claim in which they were working, and which was the valuable portion thereof, and oust them from possession by making a location thereon. The defendants in error were given no notice that the width of their claim

1052; Burke v. McDonald, 2 Idaho 679, 683, 2 Idaho (West. Ed.) 646, 17 Mor. Min. Rep. 325, 33 Pac. 49 (1890).

Montana.—Hoffman v. Beecher, 12 Mont. 89, 17 Mor. Min. Rep. 503, 31 Pac. 92 (1892).

Nevada.—Golden Fleece Co. v. Cable Consol. Co., 12 Nev. 312, 321, 1 Mor. Min. Rep. 120 (1877); Rose v. Richmond Min. Co., 17 Nev. 25, 27 Pac. 1105 (1882), affirmed in Richmond Min. Co. v. Rose, 114 U. S. 576, 29 L. Ed. 273, 5 Sup. Ct. 1055 (1885).

Oregon.—Stephens v. Woods (arguendo), 39 Or. 441, 21 Mor. Min. Rep. 443, 65 Pac. 602 (1901); Gohres v. Illinois & J. Gravel Min. Co., 40 Or. 516, 67 Pac. 666 (1902).

South Dakota.—McPherson v. Julius, 17 S. Dak. 98, 95 N. W. 428 (1903).

Utah.—Bullion B. & C. Min. Co. v. Eureka Hill Min. Co., 5 Utah 72, 11 Pac. 515 (1886); Hansen v. Fletcher, 10 Utah 266, 37 Pac. 480 (1894). See, also, Eilers v. Boatman, 3 Utah 159, 15 Mor. Min. Rep. 462, 2 Pac. 66 (1883).

English.—Granger v. Fotheringham, 3 Brit. Col. (Can.) 590 (1894).

Some of the cases say that this rule applies where excess is included by mistake, and without fraud, and is corrected before rights of third parties attach. Stem-Winder Min. Co. v. Emma & L. C. Min. Co., 2 Idaho 421, 21 Pac. 1040 (1889). Others that the rule applies except, it may be, where the excess is so large as to give rise to an inference of bad faith. See Burke v. McDonald (*dictum*), 2 Idaho 679, 2 Idaho (West Ed.) 646, 17 Mor. Min. Rep. 325, 33 Pac. 49 (1890); Gohres v. Illinois & J. Gravel Min. Co., 40 Or. 516, 67 Pac. 666 (1902); Hansen v. Fletcher, 10 Utah 266, 37 Pac. 480 (1894). See *post* division III, this note.

Exact accuracy in marking of boundaries in mining claims cannot be

was excessive, or that any part of their location was void, and they were given no opportunity to draw in their lines so as to comply with the local mining regulations. The policy of the mining laws of the United States does not permit a locator to thrust out of the possession of his discovery and the pay streak of his claim one who has located a placer claim in attempted compliance with the mining rules and laws, and who is actually engaged in mining upon that portion of his claim."

While the counsel for the plaintiffs in error concede that to be the law, they contend that where such prior locator is not in the actual possession of the claim containing an excess over the legal limit of such claims, and knowingly refuses or neglects to draw in his lines so

expected or required. See Burke v. McDonald, 2 Idaho 679, 2 Idaho (West Ed.) 646, 17 Mor. Min. Rep. 325, 33 Pac. 49 (1890). The reason for this is that the locators of mining claims rarely have the facilities or the time for making accurate surveys, and differences of a few feet are held immaterial. See McPherson v. Julius, 17 S. Dak. 98, 95 N. W. 428 (1903). In any event the notice of location does or should specify the extent of the claim, and even when the notice does not so specify the locator cannot claim more ground than the law allows. See Erhardt v. Boaro, 113 U. S. 527, 28 L. Ed. 1113, 5 Sup. Ct. 560, 15 Mor. Min. Rep. 472 (1885).

But a locator disregarding the mining laws and valid local mining rules and regulations by locating in excess of what he is entitled to take, has no right in or title to the excess as against the United States. Some of the cases hold that he has no rights in such excess as against a subsequent locator whose filing covers such excess, when such subsequent locator complies with the laws. See English v. Johnson, 17 Cal. 107, 12 Mor. Min. Rep. 202, 76 Am. Dec. 574 (1860). Hauswirth v. Butcher, 4 Mont. 299, 1 Pac. 714 (1882). But another line of cases holds that the locator of the excess cannot be deprived of such excess until he is notified of it, as declared in the principal case, and that a subsequent locator on the excess acquires no interest. See Porter v. Tonopah North Star T. & D. Co., 133 Fed. 756 (1904), affirmed 146 Fed. 385, 76 C. C. A. 657 (1906). Thus, where a prospector located a claim in excess of the maximum limit allowed by law, was in actual possession, and engaged in working his claim, a subsequent locator relocating a part of the claim, on the ground that the first location exceeded in extent that which the locator was entitled to claim, was held to take no rights. See McIntosh v. Price, 121 Fed. 716 (1903). The reason for this is that, as between two locators, and as affecting their rights only, one cannot locate grounds of which the other has the actual possession under claim or color of title, because in such a case the ground is not "vacant and unoccupied," even though the claim made to it be invalid. Price v. McIntosh, 1 Alaska 286, 301 (1901). See Russell v. Dufrese, 1 Alaska 486 (1902); Hansen v. Fletcher, 10 Utah 266, 37 Pac. 480 (1894); Sullivan v. Sharp, 33 Colo. 346, 80 Pac. 1054 (1905); Peoria & C. Mill & Min. Co. v. Turner, 20 Colo. App. 474, 79 Pac. 915 (1905); Porter v. Tonopah North Star T. & C. Co., 133 Fed. 756 (1904), affirmed 146 Fed. 385, 76 C. C. A. 657 (1906).

B. Claim Excessive in Length.

Where a mining claim exceeds in length that which is allowed by statute, or by the valid local mining rules and

as to embrace the legal limit only, any other prospector is at liberty to take such excess within another location from any part of the prior one; that, otherwise, such prior locator might hold the excess, however great, indefinitely. The question suggested is an important one, but we do not find it necessary or proper to decide it in this case, being of the opinion that it does not arise upon the record. The counsel for the plaintiffs in error rely upon Funchion's testimony, and say in their brief that he testified:

"That Zimmerman was on the ground from May 12, 1904, claiming up to his stakes, and that Zimmerman had always claimed to them, defendants in error, that they were too wide at the lower end."

We do not understand such to be the effect of the testimony of that witness, who appears to have been very frank in his answers, and from

regulations, it is invalid as to excess in length only. Atkins v. Hendree, 1 Idaho 107, 1 Idaho (West Ed.) 95; 2 Mor. Min. Rep. 328 (1867).

C. Claim Excessive in Width.

Where a claim exceeds in width that which is allowed by law or valid local mining rules and regulations, but is otherwise valid, it is invalid as to excess in width only. Jupiter Min. Co. v. Bodie Consol. Min. Co., 11 Fed. 666, 7 Sawy. 96, 4 Mor. Min. Rep. 411 (1881).

D. Claim Excessive in Length and Width.

In those cases where the claim is located, by mistake and without fraud in setting the stakes and marking the boundaries, so as to exceed in both length and width the amount of ground to which the locator is entitled, it is invalid as to such excessive measurements in length and width only. Stem-Winder Min. Co. v. Emma & L. C. Min. Co., 2 Idaho 421, 21 Pac. 1040 (1889); Hansen v. Fletcher, 10 Utah 266, 37 Pac. 480 (1894); Richmond Min. Co. v. Rose, 114 U. S. 576, 29 L. Ed. 273, 5 Sup. Ct. 1055 (1885), affirming Rose v. Richmond Min. Co., 17 Nev. 25, 27 Pac. 1105 (1882). Notices posted on the location, as required by law, claiming only the amount in length and width which the locator was entitled to claim. Hansen v. Fletcher, *supra*.

E. Excess Rejected.

The excess in length or width, or both, may be rejected, and the claim held good as to the remainder, when it does not interfere with previously acquired rights. Richmond Min. Co. v. Rose, 144 U. S. 576, 29 L. Ed. 273, 5 Sup. Ct. 1055 (1885), affirming Rose v. Richmond Min. Co., 17 Nev. 25, 27 Pac. 1105 (1882).

F. Correction of Boundary Lines.

Where an excessive amount of ground is included in a placer or in a lode claim, as marked off, the locator may at any time correct the boundary lines so as to make them comply with the statutory requirements.

California.—Howeth v. Sullinger, 113 Cal. 547, 45 Pac. 841 (1896); McElligott v. Krogh, 151 Cal. 126, 90 Pac. 823 (1907).

Idaho.—Stem-Winder Min. Co. v. Emma & L. C. Min. Co., 2 Idaho 421, 21 Pac. 1040 (1889).

Montana.—Wilson v. Freeman, 29 Mont. 470, 75 Pac. 84 (1904).

Oregon.—Sharkey v. Candiani, 48 Or. 112, 85 Pac. 219, 7 L. R. A. (N. S.) 791 (1906).

the findings of fact was evidently believed by the trial court, which is conclusive upon us. Funchion testified, in effect, among other things, that, so far from knowing that the lines of the Creek claim, as located by him, included an excess, he always thought that, in fact, they included less, although he had intended taking the full twenty acres; and he further testified that he employed a surveyor by the name of Jackson to survey the claim, who did so, and reported as the result of his survey 17.10 acres as the contents of the claim; that subsequently Zimmerman had the lines of the Creek claim surveyed by a surveyor, who reported that they contained over twenty acres; and that he (the witness)

South Dakota.—McPherson v. Julius, 17 S. Dak. 98, 95 N. W. 428 (1903).

Federal.—Tonopah & S. L. Min. Co. v. Tonopah Min. Co., 125 Fed. 389 (1903).

English.—Granger v. Fotheringham, 3 Brit. Col. (Can.) 590 (1894).

This right is manifest for the reason stated by Crease, J., who says: "I see no valid or good reason why the owner of a claim who * * * can abandon it as a whole, since *omne majus continet in se minus,* may not * * * abandon any specific portion of a claim." Granger v. Fotheringham, 3 Brit. Col. (Can.) 590 (1894).

The lines, as between a corrected corner and one not corrected, are not required to be straight lines. McElligott v. Krogh, 151 Cal. 126, 90 Pac. 823 (1907). A correction of location lines, when made, relates back to the date of the original location. See Bismark Mt. G. Min. Co. v. Sunbeam Gold Co., 14 Idaho 516, 95 Pac. 14 (1908). Strepey v. Stark, 7 Colo. 614, 17 Mor. Min. Rep. 28, 5 Pac. 111 (1884); McGinnis v. Egbert, 8 Colo. 41, 15 Mor. Min. Rep. 329, 5 Pac. 652 (1884); Craig v. Thompson, 10 Colo. 517, 16 Pac. 24 (1887); Moyle v. Bullene, 7 Colo. App. 308, 44 Pac. 69 (1896); Milwaukee G. Extract Co. v. Gordon, 37 Mont. 209, 95 Pac. 995 (1908); McEvoy v. Hyman, 25 Fed. 596, 15 Mor. Min. Rep. 397 (1885). But creates no rights (see Milwaukee G. Extract Co. v. Gordon, 37 Mont. 209, 95 Pac. 995—1908; Bunker Hill & Sullivan Min. & C. Co. v. Empire State-Idaho Min. & D. Co., 134 Fed. 268—1903) inconsistent with rights acquired by subsequent locators. Bunker Hill & Sullivan Min. & C. Co. v. Empire State-Idaho Min. & D. Co., *supra.*

A statute making null and void a location, the boundaries of which are not marked as required by law, applies in favor of conflicting claims only, and does not prevent a correction before rights of third parties attach. Sharkey v. Candiani, 48 Or. 112, 85 Pac. 219, 7 L. R. A. (N. S.) 791 (1906).

G. Selection of Portion to Be Rejected.

In those cases where the locator has included within the boundaries of his claim, as marked out, more ground than he is entitled to claim under the law and valid local mining rules and regulations, he is entitled to select the portion of the claim as staked off which is to be rejected. McIntosh v. Price, 121 Fed. 716, 58 C. C. A. 136 (1903); Zimmerman v. Funchion, the principal case; Waskey v. Hammer, 170 Fed. 31 (1909), p. ——, vol. 2, this series; Granger v. Fotheringham, 3 Brit. Col. (Can.) 590 (1894).

II. Fraudulent Inclusion of Excess

A. General Rule.

It is an inference arising from the language used in nearly all the cases announcing the general rule, as above given, that if the excess of ground in a mining claim is included not by in-

then employed another surveyor, Mr. E. G. Allen, the result of whose survey was 21.7 acres. Said the witness:

"Then we went out on the ground, and I offered Mr. Zimmermann—I told him that we had too much ground, and that, if he wanted to, I would give him 88 feet across the lower end of the claim, which would then give us twenty acres, and, if he did not take that, then, I would disclaim the excess over on the left limit. Q. What did he say? A. He said, 'Go ahead.' Q. Indicate upon Exhibit A about where the 88 feet is that you refer to. A. Across the lower end, 88 feet right across the lower end there. Q. What did he say to that, did he refuse? A. Yes, sir. Q. What did you do with reference to disclaiming on

nocent mistake, but by fraudulent design, that fact will invalidate the whole location; and there are numerous *dicta* in the opinions to this effect. Thus, in a *dictum*, the Supreme Court of Idaho says: "If a claim is made excessive in size with fraudulent intent, it (the location) is void. If made so large that it cannot be deemed the result of innocent error, fraud will be presumed; or if, in any case, it be made so large and with such indistinct marking that its boundaries cannot be readily traced, and a subsequent locator, after reasonable diligence, cannot find the same, it will be void as against another location made in good faith. Just what excess will be tolerated, or what will vitiate, cannot be defined, but must depend somewhat upon the circumstances of each case." Burke v. McDonald, 2 Idaho 679, 2 Idaho (West Ed.) 646, 17 Mor. Min. Rep. 325, 33 Pac. 49 (1890). And in a *dictum* appended to the announcement of the general rule as given above, the Supreme Court of Utah said: "We do not mean to be understood that any length, however great in excess of the limit of the grant, can be located without rendering the claim void for want of certainty. A mining claim may include so great an excess of ground as to render it absolutely void, depending upon the surroundings and particular circumstances of each case." Hansen v. Fletcher, 10 Utah 266, 37 Pac. 480 (1894). And in an Alaska case it has been questioned, but not decided, whether a mining notice which includes by its terms more land than is permitted by the mineral laws of the United States invalidates the location. Pratt v. United Alaska Min. Co., 1 Alaska 95 (1900). See Price v. McIntosh, 1 Alaska 286, 301 (1901).

The true doctrine was announced in an early Idaho case. The trial court had instructed the jury that if they found from the evidence that the claim was purposely located to include a greater number of feet than the law allowed, then the location was an attempted fraud upon the provisions of the law and the rights of others, and the location null and void as against subsequent location of the same ground. The Supreme Court says: "We do not assent to these views of the law * * *. If he (the locator) claims more than the law allows, it is void as to the excess, but the notice does not claim all the ground between the stakes * * *. To claim more than the law allows is no fraud on others, for they have the same means of ascertaining the attempted fraud that the other has to commit it. They can measure the ground and confine him to the limits prescribed by law; but to say that he should lose his claim entirely because he may have included more than he can hold within his stakes by a few feet, or by ever so much, is to give protection to the parties, subsequent claimants, who are not so likely

the other side? A. I went over on the left limit, and disclaimed that excess. Q. In what manner? A. By posting a notice there. Q. Putting up another stake? A. Putting up another stake. Q. How far from the stake that you put up on the hill, on that corner, if you remember? A. I don't remember; I measured it from the center. Q. Sufficient to reduce the claim to twenty acres? A. Yes, sir."

This survey of Allen was not made until October 22, 1906, and this action was commenced on the 8th day of September of the same year, so that it appears from Funchion's testimony, corroborated by the surveys, that, so far from knowing that his claim included an excess over the statutory limit, Funchion thought, until some time after the bringing of the suit, that his claim embraced less than twenty acres. That wit-

to need it as the prior locator is to be protected in his rights. If he has too much it is easy to discover it, and all the benefit the subsequent locator can claim is that he should be entitled to maintain his right to the excess." Atkins v. Hendree, 1 Idaho 107; 1 Idaho (West Ed.) 95, 100, 2 Mor. Min. Rep. 328 (1867).

The question was squarely raised in a South Dakota case, where it was shown that locators of a claim fraudulently included 650 feet in excess of the amount allowed by law. The court say that others could easily have determined the boundaries of the claim to which the prior locator was entitled under his location, and that the location was invalid as to the excess only. McPherson v. Julius, 17 S. Dak. 98, 95 N. W. 429 (1903). See Granger v. Fotheringham, 3 Brit. Col. (Can.) 590 (1894).

B. Sham Locations.

There is nothing in any of the cases in which the question of fraud is involved that in any way militates against, or is in any way contrary to, the doctrine announced in McPherson v. Julius, *supra*. But it is the settled law that a locator cannot, by sham location, through the use of the name of his friends, relatives, or employees, as dummies, locate for his own benefit a greater area of mining land than is allowed by law. Thus, under section 2331 U. S. Rev. Stats. (17 Stats. at Large 24, 5 Fed. Stats. Ann. 43, U. S. Comp. Stats. 1901, p. 1432), which provides that no placer location "shall include more than twenty acres for each individual claimant," a claim located by three persons, who are in the employ and acting in the interest of a single company, must be limited to twenty acres. Gird v. California Oil Co., 60 Fed. 531, 18 Mor. Min. Rep. 45 (1894). In an Alaska case, where two locators attempted to secure 160 acres of placer land by use of, in connection with their own, the names of six friends and relatives, as locators, who were but dummies, by means of which the locators sought to secure for themselves a larger area of land than the law allows, the location was held invalid for the fraud. Cook v. Klonos, 164 Fed. 529 (1908). See Mitchel v. Cline, 84 Cal. 409, 415, 24 Pac. 164 (1890).

III. Montana Rule.

In Montana, a different rule seems to prevail from the general rule above set out. In that state there is a disposition to give a strict construction to the statutes, and to require the locator to strictly conform in all respects to the requirements of the statute, and to hold any excess in marking off the claim, either in length or in width, to invalidate the location; holding that the boundaries beyond the maximum extent

ness further testified that, in 1903, he and Ross sunk a hole twenty-two feet to bed rock on the claim near the creek where they found gold, and that in the year 1904 (the year Zimmerman located Bench Claim No. 6) Zimmerman did the assessment work on the Creek claim under employment by them.

Under the circumstances appearing, we do not think it was permissible for Zimmerman to select the excess of 1.7 acres from that portion of the Creek claim that he wanted.

The judgment is affirmed.

of the ground allowed, are not boundaries at all. Hauswirth v. Butcher, 4 Mont. 299, 1 Pac. 714 (1882); Leggatt v. Stewart, 5 Mont. 107, 15 Mor. Min. Rep. 358, 2 Pac. 320 (1883). And for that reason the location is held to be void for uncertainty. Leggatt v. Stewart, *supra*. The question whether the location cannot be maintained as the amount of ground the locator is entitled by statute and valid local mining rules and regulations to claim, where the right of a third party has not intervened, was discussed but not decided in Hauswirth v. Butcher, *supra*. The ground on which that state places this ruling is that there is no grant from the government, under act of congress unless there is a location strictly according to law and valid local mining rules and regulations: that such a location is a condition precedent to the grant. Belk v. Meagher, 3 Mont. 65, 80, 1 Mor. Min. Rep. 522 (1878); Hauswirth v. Butcher, 4 Mont. 299, 1 Pac. 714 (1872).

J. R. CROWE COAL & MINING CO. v. ATKINSON et al.

[Supreme Court of Kansas, July, 1911.]

— Kan. —, 116 Pac. 499.

1. Injunction—Right of Possession.

One claiming the right to mine coal in lands held as to title and possession by another, may try that right by bill for injunction where the record shows clearly that the right of trial by jury was not infringed.

2. Burnt Deeds—Secondary Evidence.

Evidence of annotations in official indexes, indicating an exception in a burnt deed, together with evidence of a custom of the railroad company grantor to make such exceptions and a portion of the deed supporting the contention, held sufficient to show a reservation of the mineral rights in land granted.

3. Severance of Surface and Mineral Rights.

The severance of the surface and mineral rights is accomplished either by a conveyance of the land with an express reservation of the minerals, or by a conveyance of the minerals or mining rights.

4. Severance of Mineral Rights—Taxation—Evidence.

Where there is no showing that coal in place is separately assessed or that its existence increased the taxes against the land, the nonpayment of taxes is not in derogation of a claim of ownership in the coal alone.

5. Mortgages—Foreclosure.

An instruction that a sheriff's deed could not affect one not made a party to the foreclosure suit may be construed as meaning that his existing rights are not affected thereby.

6. Severance of Mineral Rights—Adverse Possession.

Possession for agricultural purposes only, although taken and held under an ordinary deed purporting to transfer complete ownership, is not deemed adverse to mining rights previously severed by reservation in a deed in the same chain of title.

7. Adverse Possession.

The question of whether possession is adverse or not is one of law.

Appeal from District Court, Cherokee County.

Action for injunction by the J. R. Crowe Coal & Mining Company against Lillie Atkinson and Ed Atkinson. Judgment for plaintiff. Defendants appeal. Affirmed.

For appellants—F. M. Brady and Sapp & Wilson.

For appellees—Skidmore & Walke

NOTE.

Injunction against entering or trespassing on land of which defendant is in possession, see Williams v. Long, 20 Mor. Min. Rep. 738 and note thereto.

MASON, J. The J. R. Crowe Coal & Mining Company claimed to have the right to mine the coal underlying land the title to which, subject to that right, was conceded to be in Lillie Atkinson. It brought an action against her and her husband, Ed Atkinson, to enjoin them from interfering with its occupancy of so much of the land as was necessary to its mining operations. Judgment was rendered for the plaintiff, but this was reversed upon the ground that the defendants were entitled to a trial by jury. Atkinson v. Crowe, 80 Kan. 161, 102 Pac. 50, 106 Pac. 1052. Upon a second trial a jury returned a verdict for the plaintiff, upon which a judgment was rendered, and the defendants again appeal.

The defendants maintain that they were in possession of the property in controversy under claim of title, and that, therefore, if the plaintiff was entitled to recover at all, its remedy was by ejectment, and not by injunction. Whether or not ejectment would have been an available remedy, the peculiar situation suggested plausible grounds for proceeding by injunction. Upon the first appeal the judgment was reversed specifically because a jury trial had been denied. The fact that the order of reversal was based wholly on this ground fairly implied that the action was regarded as maintainable in the form in which it was brought. Moreover, the parties have been afforded a fair opportunity to try out their controversy, the claims of each were fully understood by the other, and the judgment fixes their respective rights. In this situation the decree ought not to be disturbed on account of the form of the action. The defendants suggest that, although a jury passed upon the evidence, its findings were only advisory, because that is the ordinary rule in injunction and other equitable proceedings. Here, however, this court reversed the first judgment because the issue involved was one upon which a jury trial was a matter of right. It follows that the decision of the jury was final unless set aside upon such grounds as would be available in ejectment or any strictly legal action.

The facts out of which the controversy grows are stated in the former opinion. They are substantially as follows: The land involved was formerly owned by the Kansas City, Ft. Scott & Gulf Railroad Company. About July 20, 1881, that company executed a deed to Jeremiah Hogan. The plaintiff claims, and the defendants deny, that this deed contained a reservation of the coal and lead mineral underlying the land, with the right to enter upon the surface for the purpose of mining it. The deed was filed for record August 13, 1881. In the fall of 1885 some of the books of record in the office of the register of deeds, including that in which this deed was recorded, were destroyed by an explosion. Hogan gave an ordinary mortgage on the land, containing no reference to any reservation or exception. This was foreclosed without the railroad company

being made a party, and the defendants claim through a sheriff's deed purporting to convey a complete title. The plaintiff has succeeded to the rights of the railroad company in connection with the coal. At the time the action was brought, the defendants and those through whom they claim had been in the actual possession of the land for over 15 years, asserting title through the sheriff's deed. They had never, however, undertaken any mining operations thereon, having used it for agricultural purposes only.

The principal question of fact is whether the deed from the railroad company contained a reservation of the mineral rights. The principal question of law is whether the continuous occupancy of the surface for 15 years under a deed purporting to convey the entire property barred the claim to the coal on the part of the railroad company and its grantee.

The jury specifically found that the deed did contain the reservation referred to, and we think the finding abundantly supported by the evidence. Annotations in official indexes which escaped destruction indicated an exception in the deed with regard to the minerals. There was testimony that deeds from the railroad company at that time contained the form of reservation claimed by the plaintiff. A portion of a partially destroyed volume was produced which apparently had contained the record of this deed; and so much of its language as was preserved supported the contention of the plaintiff. Objections are made to the competency of the evidence, but we do not think them well founded. "The severance of the surface and mineral rights is accomplished either by a conveyance of the land with an express reservation of the minerals, or by a conveyance of the minerals or mining rights." 27 Cyc. 682; Moore v. Griffin, 72 Kan. 164, 83 Pac. 395, 4 L. R. A. (N. S.) 477. "After the mineral is conveyed apart from the land, or vice versa, two separate estates exist, each of which is distinct. The surface and the mineral right are then held by separate and distinct titles in severalty, and each is a freehold estate of inheritance separate from and independent of the other." 27 Cyc. 687. "Adverse possession of the surface of the land does not necessarily include possession of the minerals below it, where the title to the latter has been severed by deed from that to the surface." 1 A. & E. Encycl. of L. 875. While the mere occupancy of the surface, where a severance has previously been accomplished, does not of itself constitute adverse possession of the underlying mineral, there is room for a plausible argument that, if the occupant of the surface claims under a deed which purports to convey a complete title to the entire property, his possession should be characterized by the terms of the instrument under which he holds, and he should be deemed to be asserting dominion over

the whole. But the authorities are practically uniform in holding to the contrary. Any use to which the surface of the ground may be put differs so widely in character from the extraction of the minerals thereunder—the operations are so disconnected and unrelated—that a possession exercised for agricultural purposes only, although taken and held under an ordinary deed purporting to transfer complete ownership, ought not to be deemed adverse as to mining rights previously severed by a reservation in a conveyance in the same chain of title. The following cases support this view: Murray v. Allred, 100 Tenn. 100, 43 S. W. 355, 39 L. R. A. 249, 66 Am. St. Rep. 740; Caldwell v. Copeland, 37 Pa. 427, 78 Am. Dec. 436; Lulay et al., Appellants, v. Barnes, 172 Pa. 331, 34 Atl. 52; Gordon v. Park, 202 Mo. 236, 100 S. W. 621, 119 Am. St. Rep. 802; Gordon v. Park, 219 Mo. 600, 117 S. W. 1163; Gill v. Fletcher, 74 Ohio 295, 78 N. E. 433, 113 Am. St. Rep. 962; Catlin Coal Co. v. Lloyd, 176 Ill. 275, 52 N. E. 144; Catlin Coal Co. v. Lloyd, 180 Ill. 398, 54 N. E. 214, 72 Am. St. Rep. 216; Steinman v. Jessee, 108 Va. 567, 62 S. E. 275; Marvin v. Brewster Iron Mining Co., 55 N. Y. 538, 14 Am. Rep. 322. The defendants undertake to distinguish these cases upon the ground that here the occupant of the surface had no knowledge or notice of the existence of a right to the minerals apart from the general title to the land. Whether they had actual information on the subject cannot be controlling. The deed in which the severance was accomplished by a reservation of the mineral rights was duly recorded. While the record itself was destroyed, there remained sufficient annotations in the indexes to advise a careful examiner that it was not a deed in the ordinary form. An investigation of the clue thus afforded would have developed the actual fact. The defendants derived their title under this deed and cannot under these circumstances found a right upon ignorance of its provisions. Taylor v. Mitchell, 58 Kan. 194, 48 Pac. 859; Knowles v. Williams, 58 Kan. 221, 48 Pac. 856.

The principle stated is really determinative of the controversy, and the specific rulings assigned as errors really present different aspects of the same question of law. Complaint is made of the refusal to submit a special question requiring the jury (among other matters) to say whether the possession of the defendants was adverse as to the plaintiff. This presented a question of law. The findings that were made sufficiently determine the essential facts in the case, and the general verdict was in accordance with them. In submitting a question concerning the possession of the "premises in question," the court, over the objection of the defendants, stated that the only property in dispute was the coal in place. This was certainly not prejudicial, as it tended to prevent a confusion of the issue. Most of the instructions refused, so far as they are con-

sistent with the rule of law already announced, were in substance covered by the general charge.

The court was asked to say that, if the mineral rights had been reserved by the railroad company, it should thereafter have paid the taxes if it claimed to own the mineral. Instead, the jury were told that prior to 1897 there was no provision of the law for the separate taxation of coal in place. As there is no showing that the coal was assessed as such, or that the taxes charged against the land were increased by reason of its existence, the nonpayment of taxes is not in derogation of a claim of ownership by the railroad company. An instruction was given to the effect that, to enable the defendants to recover upon the theory of an adverse occupation for 15 years, they must have conducted mining operations continuously for that period. Whether the word "continuously" should have been used need not be determined, since it is conceded that no mining on the land was ever done by any one prior to the beginning of this action. An instruction that the sheriff's deed could not affect the rights of the railroad company because it was not a party to the foreclosure is criticised on the ground that, under some circumstances, the deed might be the basis of a claim or defense against the company. We think the language fairly meant merely that the company, not being a party, was not bound by the judgment, and its existing rights were not changed by it. Some evidence which was at first admitted was afterwards ruled out. The defendants assert that prejudice to them resulted, but we see nothing in the record to indicate this.

The judgment is affirmed. All the justices concurring.

WASHOE COPPER CO. v. JUNILA et al. (HALL et al., Interveners).

[Supreme Court of Montana, April 17, 1911.]

— Mont. —, 115 Pac. 917.

1. **Placer Claim—Known Vein.**

Where a known vein exists within the ground claimed in an application for placer, it remains public property of the United States.

2. **Same—Knowledge.**

In order to exclude a lode from a placer claim, the lode must have been known to the applicant or to the community in general at the time of application.

3. **Same—Evidence.**

Where it is sought to exempt a particular lode from a placer claim, evidence of the character and extent of the lode as divulged by operations subsequent to the placer application, held competent.

4. **Same—Patent—Evidence.**

A placer patent establishes conclusively that the ground was and is placer, and evidence that placer mining operations were never carried on is immaterial.

5. **Location Certificate—Affidavit.**

A declaratory statement (location certificate) which does not contain an affidavit is void, and the receipt in evidence of a certified copy is erroneous.

6. **Same—Evidence.**

A copy of a declaratory statement (location certificate) offered to prove the extent of work by a former claimant, is objectionable as not the best evidence.

7. **Same—Evidence.**

In an action to determine the rights of those operating on a lode within a placer claim, a copy of the declaratory statement of a prior location, since abandoned, is immaterial and inadmissible.

8. **Evidence—Admissions of Grantor.**

Declarations of a former owner are admissible against a subsequent holder only when made against interest by a grantor of the present holder while holding the title in controversy.

9. **Same—Admissions by Grantor.**

Declarations by one claiming under a placer claim and a quartz location, whereby he acknowledges the existence of a known lode upon the placer claim, held inadmissible to defeat the record title.

10. **Constructive Notice.**

A void instrument cannot impart constructive knowledge to any one.

11. **Stipulations by Counsel.**

A stipulation of counsel to the effect that the interveners have acquired whatever rights were obtained by specified locations does not relieve them from proving the validity of the said locations.

Appeal from District Court, Silver Bow County; John B. McClernan, Judge.

NOTE.

As to reservation of known lodes, see | Cranes Gulch Min. Co. v. Scherrer, 21 Mor. Min. Rep. 549.

Action for damages for ores extracted and for an injunction by the Washoe Copper Company against John Junila and others, W. H. Hall and others intervening.

Judgment for defendants and interveners. Plaintiff appeals. Reversed and remanded.

For appellant—C. F. Kelley, D. Gay Stivers and L. O. Evans.

For respondents—John J. McHatton.

HOLLOWAY, J. This action was brought by the Washoe Copper Company against Junila and others to recover damages for ores extracted from ground claimed by the plaintiff, and for an injunction to restrain further trespasses.

The plaintiff alleges its ownership in and to an irregularly shaped piece of ground in the N. E. ¼ of the S. W. ¼ of section 18, township 3 N., of range 7 W., in Silver Bow County. The defendants answered, admitting that they had mined in a portion of the ground claimed by plaintiff, denied plaintiff's ownership of such portion, alleged that they were merely lessees of others who claim to be the owners, and pleaded affirmatively that plaintiff's only claim of ownership to the ground described in the complaint is by virtue of mesne conveyances from the original patentees of placer 765; that, when application for patent to such placer was made, there existed within the boundaries of the placer claim a well-known lode or vein; that the applicants for placer patent did not apply for patent to such lode or vein and the same was excepted from the placer patent; and that all acts done by defendants were done upon such known lode or vein. Thereafter Hall and others filed a complaint in intervention, in which they set forth substantially the same facts as those pleaded affirmatively by the defendants, and other facts to which reference will be made hereafter. They describe particularly the ground claimed by them, and conclude with a prayer for general relief. Issues were joined upon all the affirmative allegations contained in the answer and the complaint in intervention, except that plaintiff admitted that its only claim of ownership is by virtue of mense conveyances from the original placer patentees. The trial court found in favor of the defendants and interveners, and rendered a decree in favor of interveners, adjudging them to be the owners of the ground claimed by them. From the decree and an order denying it a new trial, the plaintiff has appealed.

1. Error is predicated upon the action of the trial court in overruling plaintiff's demurrer to the affirmative defense pleaded in the answer of defendants. But we think there is not any merit in the contention; for even assuming that sufficient facts are not pleaded to entitle defendants to

affirmative relief—and they do not seek any—still the facts, which, if true, show the existence of a known vein within the ground claimed by plaintiff at the time the application for placer patent was made, state a defense to plaintiff's cause of action; for, if such known vein existed, it remained public property of the United States, and plaintiff will not be heard to object to defendants carrying on mining operations upon it. Reynolds v. Iron-Silver Min. Co., 116 U. S. 687, 6 Sup. Ct. 601, 29 L. Ed. 774.

2. Complaint is made of the action of the court in admitting evidence of the condition upon the ground, particularly as to the character and extent of the vein disclosed by development made since the placer application. The question involved was determined by this court adversely to appellant in Noyes v. Clifford, 37 Mont. 138, 94 Pac. 842.

3. As a part of their proof, interveners introduced in evidence over the objection of plaintiff, a certified copy of the declaratory statement of the Morning Star quartz lode mining claim. This declaratory statement purports to have been made by Charles Colbert in 1877, and recites that on July 2, 1877, Colbert made discovery of mineral-bearing rock in place at a point which is now within the boundaries of the ground claimed by plaintiff. It is conceded that the declaratory statement was not verified as required by the law in force at the time; but in offering the certified copy counsel for interveners say: "The purpose of offering this, may it please the court, is not to prove title under the location itself, but for the purpose of showing that this vein was known to exist at the time when he located it by Charles Colbert, and to show what was done by Charles Colbert and others with reference to working the vein." In O'Donnell v. Glenn, 8 Mont. 248, 19 Pac. 302, this court held that a declaratory statement which does not contain the required affidavit is void, and that decision has been followed uniformly since. See Hickey v. Anaconda Copper Min. Co., 33 Mont. 46, 81 Pac. 806. Since the Morning Star declaratory statement was void, the receipt in evidence of a certified copy of it was error.

It is apparent from the statement of counsel made when the copy was offered that the purpose of introducing it was to show general knowledge on the part of the people of the community that a vein existed within the boundaries of the placer prior to the application for patent, presumably upon the theory that proof of such condition in 1877 would tend in some degree to establish knowledge of a similar condition when the application for placer patent was made in February, 1880. That a void instrument cannot impart constructive knowledge to any one is elementary; and the fact that the trial court admitted this evidence, and that in finding No. 1 reference is made to the Morning Star location, and the further

fact that the court did not find especially that the placer patentees had actual knowledge of the existence of the vein at the time when they applied for patent, but only that they had such knowledge, actual or constructive, seems to justify the conclusion that the court must have attached some importance to the contents of this declaratory statement.

In order to exclude a lode from a placer claim, the lode must have been known at the time the application for placer patent was made; but actual knowledge on the part of the placer applicant is not absolutely essential. In Iron-Silver Min. Co. v. Mike & Starr G. & S. Min. Co., 143 U. S. 394, 12 Sup. Ct. 543, 30 L. Ed. 201, it is said: "It is enough that it be known, and in this respect, to come within the intent of the statute, it must either have been known to the applicant for the placer patent or known to the community generally, or else disclosed by workings and obvious to any one making a reasonable and fair inspection of the premises for the purpose of obtaining title from the government." This rule has been followed in the mining states generally. Brownfield v. Bier, 15 Mont. 403, 39 Pac. 461. It seems a fair inference from this record that the placer patentees who denied actual knowledge of the existence of a vein within the boundaries of their placer claim at the time of their application for patent were charged with knowledge of the existence of such vein by the evidence furnished by this declaratory statement.

In so far as the copy of the declaratory statement was offered to prove the extent or character of the work done by Colbert, it was subject to the objection that it was not the best evidence, in addition to the other objection considered.

The immateriality of the evidence is also apparent, since neither plaintiff nor interveners claimed under the Morning Star location. In fact, the evidence shows that that claim was abandoned.

4. The interveners also introduced in evidence, over the objection of plaintiff, a deposition of Charles Colbert, taken in 1895, in an action entitled Montana Central Railway Company v. Midgeon et al. The deposition was not taken in a case in which any of the parties in this action were interested, but it is contended that it was competent to prove by it declarations made by Colbert to the effect that there was a known lead, lode, or vein within the boundaries of placer 765 at the time the application for placer patent was made, and this upon the theory that at the time the declarations were made Colbert owned the placer ground now claimed by the plaintiff, and that the declarations were against interest.

If the admission of these declarations can be justified at all, it must be done under the provisions of section 7866, Rev. Codes, as follows: "Where, however, one derives title to real property from another, the declaration, act or omission of the latter, while holding the title in relation

to the property is evidence against the former." This section is but declaratory of the common law. It does not add to or subtract from the rule as it existed prior to the adoption of the statute. Frink v. Roe, 70 Cal. 296, 11 Pac. 820. In this last case the California court said: "Any declarations, acts, or omissions of the grantor while holding the title in relation to the property, and which could have been introduced against him while an owner, may be introduced against his grantee—nothing more." In 1 Jones on Evidence, § 241, the reason for the rule is given as follows: "The principle upon which such evidence is received is that the declarant was so situated that he probably knew the truth, and his interests were such that he would not have made the admissions to the prejudice of his title or possession, unless they were true. The regard which one so situated would have to his interest is considered sufficient security against falsehood." See, also, 2 Wigmore on Evidence, § 1080.

However, when a declaration of this character is offered, the party making the offer must show (a) that it was made while the declarant was holding the title to the property in controversy; (b) that the declarant was in fact the grantor of the party against whom the declaration is offered; and (c) that the declaration was against interest. The only evidence in this record touching Colbert's title to any portion of placer 765 is furnished by a deed from Marsh and Nichols, the original placer patentees, to Emory, Tong, and Colbert, dated April 19, 1880, and conveying the following described property: "All that portion of lot numbered seven in section eighteen, T. 3 N. R. 7 W., lying north of a line drawn parallel with the south boundary line of said Lot No. 7, 10.91 chains distant therefrom; excepting that piece conveyed to George W. Maston." It appears sufficiently that lot 7, mentioned above, is placer 765; but, since there is not any description whatever given in this record of the portion which had theretofore been conveyed to Maston, it is impossible to know whether Colbert ever owned the land in controversy, whether he owned it at the time the declarations were made or whether plaintiff derived its interest from Emory, Tong, and Colbert, or is the successor in interest of Maston. Under the pleadings, it was unnecessary for plaintiff to prove its chain of title from the original placer patentees; and, since the interveners had the burden of showing that Colbert was the grantor of plaintiff and failed, the declarations made by Colbert were hearsay and inadmissible against the plaintiff, under the provisions of the code section cited above. Harrell v. Culpepper, 47 Ga. 635.

But the declarations were inadmissible for a further reason. Whatever interest Colbert acquired in placer 765 he retained until 1900. It appears, also, that he was one of the locators of the Green

Copper quartz claim, which location it is alleged in the complaint in intervention was made in 1891, and it is fairly inferable that whatever interest, if any, he acquired in the quartz location he retained until after 1895. If we assume, then, that the portion of the placer conveyed to Colbert included the ground now claimed by plaintiff, and that the Green Copper was a valid quartz location, neither of which appears as a fact from this record, then we are confronted with this situation: Colbert while claiming a piece of ground as placer, and also claiming a portion of the same under a quartz location, makes a declaration against his placer interest and in favor of his quartz claim; that is to say, his declaration is to the effect that there was a vein—the one upon which the Green Copper was located—within his portion of the placer at the time the application for the placer patent was made. The effect of this declaration, if true, is to prove that the extent of his placer claim is less than it purports to be; and, having conveyed away all that his placer purports to have been, the direct effect of this declaration is to destroy title to that portion of the placer crossed by the vein and a strip of 25 feet on either side thereof. In other words, his declaration destroys the record title to that portion of the placer. In Dodge v. Freedman's Savings & Trust Co., 93 U. S. 379, 23 L. Ed. 920, the Supreme Court of the United States said: "Such declarations are competent only to show the character of the possession of the person making them, and by what title he holds, but not to sustain or to destroy the record title."

5. In a number of instances the court permitted the interveners to show, over plaintiff's objection, that there had never been any placer mining carried on on placer 765. The evidence was altogether immaterial. The placer patent to Marsh and Nichols established conclusively the fact that the ground was and is placer; and the effect of the patent cannot be overcome by evidence that placer mining operations were never carried on. Dahl v. Raunheim, 132 U. S. 260, 10 Sup. Ct. 74, 33 L. Ed. 324; Butte & Boston Min. Co. v. Sloan, 16 Mont. 97, 40 Pac. 217.

6. The trial court found that at the date of the application for placer patent there was a well-known lode within the boundaries of placer 765 disclosed in workings at the Morning Star shaft; that the vein was such as to except it from the general grant of the placer patent, under section 2333, U. S. Rev. St. (U. S. Comp. St. 1901, p. 1433). The complaint in intervention alleges that in June, 1889, Henry L. Haupt made discovery of mineral-bearing quartz in place within the boundaries of placer 765, and upon the same lode or vein which was known to exist at the time application for placer patent was made; that Haupt made and completed his location, designating it the Sunbury quartz lode mining claim. It is also alleged that in January, 1891, Ginsberg and others made

discovery of mineral-bearing quartz in place upon the same vein within the boundaries of placer 765; that they made and completed the location of the Green Copper quartz lode mining claim; that by mesne conveyances the interveners became the successors in interest of the locators of the Sunbury and Green Copper claims, and thereafter filed for record an amended declaratory statement of the Green Copper claim, "and ever since have held and owned the property under said amended declaratory statement." All these allegations were denied. Upon the trial, the interveners did not offer any evidence in support of the allegations above. It is insisted, however, by counsel for interveners that they were relieved from making such proof by a stipulation entered into by counsel for the respective parties at the trial, as follows: "First, that the plaintiff has acquired whatever right was given by [the placer] patent to the original patentees to the premises that are herein in dispute; second, that the interveners have acquired whatever right was obtained by the location of the Green Copper, the Sunbury, and the Green Copper as amended."

In finding No. 8 the trial court accepted interveners' theory, and decreed to them the vein and 25 feet on each side for 1,500 feet, and thereby carved out of the ground claimed by plaintiff a parcel 50 feet wide and about 1,500 feet long. That the stipulation is not open to the construction given it is apparent. It is an admission by plaintiff that interveners acquired whatever rights were obtained by the locators of the Sunbury and Green Copper claims, and the Green Copper as amended; but it does not admit that any one of these claims was a valid location, or that the locators ever acquired any rights whatever by virtue of them. The stipulation did not go further than to relieve interveners from deraigning their title after proving valid locations of those claims. Upon the record before us, interveners were not entitled to affirmative relief. Assuming the existence of a known lode within the placer at the time the application for patent was made, such lode is open to location at this time, so far as we are informed by this record; and, if so, the trial court cannot by its decree preclude the plaintiff or any one else from locating it.

As said above, the interveners apparanetly based their claim upon the Green Copper location as described in their amended declaratory statement; but they pleaded that Haupt in 1889 located the Sunbury claim, while the Green Copper was not located until 1891, and the evidence discloses that the Green Copper discovery shaft is within the boundaries of the Sunbury claim; that, if the Sunbury was a valid location, it is difficult to understand how they can predicate any right upon the Green Copper claim, or the same claim as described in their amended declaratory statement.

Other questions are suggested in the briefs, but they are not necessary to a determination of the cause upon this appeal, and may not arise again; but for the errors heretofore considered the judgment and order are reversed and the cause is remanded for a new trial.

Reversed and remanded.

BRANTLY, C. J., and SMITH, J., concur.

CHICAGO, B. & Q. R. CO. v. BOARD OF SUPERVISORS OF APPANOOSE COUNTY.

[Circuit Court S. D. Iowa, E. D., July 27, 1908.]

170 Fed. 665.

1. Constitutional Law—Drainage Statutes.

A statute authorizing the board of supervisors of a county to create a drainage district, appoint commissioners to classify the lands benefited, and assess the benefits, giving the owners notice of the time and place for hearing the report, after which levies are to be made to pay expenses, is consistent with the Constitution of Illinois.

2. Same—Crossing Railroad Right of Way—Damages for Bridges.

A statute providing that a railroad company shall make a ditch or channel determined upon for drainage purposes across its right of way, the expense thereof being allowed the company as its damages, but that it shall be allowed no damage on account of bridges which it might be compelled to build, is not unconstitutional.

CASE NOTE.

Constitutional Power to Establish Drains and Drainage Districts.

As to the legal character of drainage districts, see note to People ex rel. Chapman v. Sacramento Drainage District, *ante*, p. 107.

As to source of legislative power to drain lands, see note to Coffman v.

3. Federal Courts—Construction of State Statutes.

The federal courts will not consider the construction of statutes by state courts or the consistency thereof with the state Constitution, where made before any rights or burdens involved in the litigation were imposed.

4. Drainage a Public Use—Assessments for Benefits.

The drainage of swampy, marshy, and overflowed lands is a matter of public health, convenience, and welfare for which the legislature may provide, and distribute the expense among those who will be benefited as much or more than the amount assessed against them.

5. Drainage—Rights of Railroad Companies.

The rights of a railroad company to bridge over a natural water course crossing its right of way are not superior to those of the public to use the water course for draining lands.

St. Frances Drainage District, p. ——, vol. 3, this series.

As to whether action in regard to drainage is legislative or judicial, see note to Smith v. Claussen Park Drainage & Levee District, p. ——, vol. 2, this series.

As to notice required as due process of law, see note to Ross v. Board of Supervisors of Wright County, *ante*, p. 358.

As to public benefit and interest must be involved, see note to Campbell v. Youngson, p. ——, vol. 2, this series.

As to inclusion or exclusion of lands in drainage district, see note to Hull v. Sangamon River Drainage District, *post*, p. 593.

As to powers of commissioners, etc., see note to Seibert v. Lovell, *post*, p. 261.

As to conclusiveness of decision of drainage commissioners and other officers, see note to Chapman & Dewey Land Co. v. Wilson, p. ——, vol. 2, this series.

As to collateral attack on drainage proceedings, see note to Chapman & Dewey Land Co. v. Wilson, p. ——, vol. 2, this series.

As to waiver of irregularities in drainage proceedings, see note to Smith v. Claussen Park Drainage & Levee District, p. ——, vol. 2, this series.

As to bonds of drainage districts, see note to Sisson v. Board of Supervisors of Buena Vista County, p. ——, vol. 3, this series.

For historical review of reclamation districts in California, see People ex rel. Chapman v. Sacramento Drainage District, *ante*, p. 107.

I. General Power.

A. In Discretion of Legislature.

The legislature has the power to provide for the reclamation of overflowed lands and to impose a tax thereupon in proportion to the estimated special benefits which those lands will receive from the work done. People ex rel. Chapman v. Sacramento Drainage District, 155 Cal. 373, Pac. 207, *ante*, p. 107.

Drainage laws are close akin to sewer laws. The private property that is benefited by sewers can be charged for the benefits it receives against the wishes of the owner. So also can agricultural land be charged for benefit conferred upon it. It is competent for the state to raise up governmental agencies for enforcement of its police power. The agency thus created is an arm and political subdivision of the state and exercises prescribed functions of government.

Federal.—Wurts v. Hoagland, 114 U. S. 606, 5 Sup. Ct. 1086, 29 L. Ed. 229 (1884); Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 17 Sup. Ct. 66, 41 L. Ed. 369 (1896).

Arkansas.—Cribbs v. Benedict, 64 Ark. 555, 44 S. W. 707 (1897).

Illinois.—Badger v. Inlet Drainage District, 141 Ill. 540, 31 N. E. 170 (1892).

6. Police Power—Drainage of Lands Is Within.

Whatever promotes the public health, safety, convenience, and welfare, limited to certain lines, is an exercise of the police power for which property, without compensation can be taken, and expense and burdens be imposed without allowance of the equivalent by way of damages.

7. Drainage—Findings as to Public Health, Convenience, and Welfare Conclusive.

Findings of a board of supervisors as to the necessity for a new channel for a stream for purposes of drainage, to the end that the public health, convenience, and welfare would be promoted, and as to the location, benefits, and depth and breadth of the new channel, are findings of fact with which the courts have nothing to do.

8. Same—Excessive Benefits.

The finding of a board of supervisors that a new channel for a stream is necessary for purposes of drainage, which compels a railroad company to erect a new bridge within a mile of an old one, and assessing $10,000 for benefits from the drainage cannot, considered on the evidence, be held void.

Indiana.—Zigler v. Menges, 121 Ind. 99, 22 N. E. 782, 16 Am. St. Rep. 357 (1889).

Kansas.—Roby v. Shunganunga Drainage Dist., 17 Kan. 754, 95 Pac. 399 (1908).

Missouri.—Mound City Land & Stock Co. v. Miller, 107 Mo. 240, 70 S. W. 721, 60 L. R. A. 190, 94 Am. St. Rep. 727 (1902).

Ohio.—Taylor v. Crawford, 72 Ohio St. 560, 74 N. E. 1065, 69 L. R. A. 805 (1905).

Wisconsin.—Donnelly v. Decker, 58 Wis. 461, 17 N. W. 389, 46 Am. Rep. 637 (1883).

The Statute of 1905 (p. 443), creating the Sacramento and San Joaquin Rivers taining land situated in ten different counties, for the purpose of promoting drainage therein, providing for the election of commissioners with various duties and powers, and also for levying of assessments on lands benefited to pay the cost of the reclamation thereof, and creating a board of river control with powers for straightening and controlling the Sacramento and San Joaquin Rivers is not unconstitutional. People ex rel. Chapman v. Sacramento Drainage District, 155 Cal. 373, 103 Pac. 207, *ante*, p. 107.

In the absence of constitutional prohibition, the legislature may arbitrarily create, abolish or change the boundaries of sanitary districts. City of Chicago v. Town of Cicero, 210 Ill. 290, 71 N. E. 356 (1904).

The power of the legislature to create districts for the purpose of drainage and to provide for assessment to be made therein by the drainage board, to pay for such improvements, cannot be successfully questioned. Ross v. Supervisors, 128 Iowa 427, 104 N. W. 506, 1 L. R. A. (N. S.) 431 (1905); Roby v. Shunganunga Drainage Dist., 77 Kan. 754, 95 Pac. 399 (1908).

The character of a reclamation district is that of a public corporation, and as such can be created in the manner provided by general law and also by special act or by implication of law. Legislative recognition of a corporation is in many cases sufficient proof of its existence. Powers or privileges may be conferred or duties enjoined of such a character that a corporation would be required, and from such, a corporation must be implied. People v. Reclamation Dist. No. 108, 53 Cal. 346 (1879).

The reclaiming of vast bodies of land may justly be regarded as a public improvement of great magnitude and the utmost importance to the community, and a plan to divide the territory to be reclaimed into districts, and assessing the cost of improvements on land to be benefited, is within the power of the legislature. Hager v. Supervisors of Yolo

9. Drainage Districts—Parties in Interest.

A holding company of several railroads has no interest in cases arising from drainage assessment levied against the sub-company.

Appeal to state district court from proceedings resulting in assessments for drainage purposes and from there transferred to federal court.

For appellant—H. H. Trimble.

For appellee—Clarence A. Baker.

SMITH McPHERSON, District Judge. The Chariton River runs from north to south across Appanoose County, Iowa, its course being

County, 47 Cal. 222 (1874); Turlock Irr. Dist. v. Williams, 76 Cal. 360, 18 Pac. 379 (1888).

Public health, convenience, and welfare mean the effect upon the people of the particular vicinity concerned. In contrast to the benefits of the few, it means those things which benefit the many. It is within the power of the legislature to further the public health, convenience or welfare by the enactment of drainage laws or by providing for the protection of property by dykes and levees. State ex rel. Harris v. Hanson, 80 Neb. 724, 115 N. W. 294 (1908).

As to legislative power to determine extent of district, see note, II, A, to Hull v. Sangamon River Drainage District, *post*, p. 595.

As to establishment of drain or district being legislative act, see note, I, A, to Smith v. Claussen Park Drainage & Levee District, p. ——, vol. 2, this series.

As to expediency of drainage being a question for the legislature, see note I, B, to Smith v. Claussen Park Drainage & Levee District, p. ——, vol. 2, this series.

As to source of title of lands being immaterial, see note IV, A, to Hull v. Sangamon River Drainage District, *post*, p. 601.

B. By General Laws.

The drainage of large tracts of swamp and overflowed or submerged land is a subject of such public and general interest that the legislature may provide for it by general enactment, and such provision may include the creation of local political organizations to serve as agencies for the accomplishment of the desired end. Neal v. Van Sickel, 72 Neb. 105, 100 N. W. 200 (1904).

Under constitutional provision that general laws may be passed permitting the owners or occupants of agricultural lands to construct and maintain for the drainage thereof necessary drains, ditches, and dykes upon the lands of others, under proper restrictions and with just compensation, but no special laws shall be enacted for that purpose, the legislature has power to enact general laws for such drainage including the lands of nonconsenting owners, and to levy assessments for the benefits resulting therefrom. In re Tuthill, 50 N. Y. Supp. 410 (1898).

C. By Special Laws.

1. General Rule.

Expressions will be found in cases where reclamation districts have been designated corporations for municipal purposes, or public corporations, or corporations for public purposes, but these were convenient phrases of designation and descriptive rather than judicial declarations as to the nature and character of these agencies. Conceding a reclamation district to be a corporation at all, it is not a corporation for municipal purposes, within the meaning

tortuous and winding through the valley, which is from two to three miles in width. The stream is subject to overflow, at times covering practically all the bottom lands. The Chicago, Burlington & Quincy Railroad Company owns two lines of railroad, crossing said bottom lands in an easterly and westerly direction, two miles more or less apart, crossing the river on bridges built several years since, and across the bottom land on embankments, and at one or more depressions on trestles. One of these roads is known as the Keokuk & Western Railroad, and the other as the Chicago, Burlington & Kansas City Railroad. In 1904 the Iowa legislature enacted a statute (chapter 68, p. 61, Acts 30th Gen. Assem.) entitled, "An act to promote the public health,

of the Constitution prohibiting the creation of corporations for municipal purposes by special laws, nor is it a private corporation within the meaning of the Constitution prohibiting the creation of private corporations by special laws, and therefore should they be held to be corporations, they are corporations in a class by themselves, and the general powers of the legislature for their creation, organization, and control are in no wise limited by the Constitution. People ex rel. Silva v. Levee Dist. No. 6 of Sutter County, 131 Cal. 30, 63 Pac. 676 (1900).

Reclamation districts are not municipal corporations within the purview of the provision of the Constitution prohibiting the creation of corporations by special acts. They are agencies of the state, organized to perform a certain work, to which the state has given a certain degree of discretion in making the improvements contemplated, and therefore they may be created by special act. Reclamation Dist. No. 70 v. Sherman, 11 Cal. App. 399, 105 Pac. 277 (1909).

The legislature may by act or repeal of an act dissolve a reclamation district. No general law providing a method in which those interested may cause a corporation to be dissolved would meet the case. It is a public agency called into existence to construct a public work; to do something which the general policy of the state required to be done. The state changes its policy, revokes the agency, and thereby ends the corporation, which exists only for that purpose. People ex rel. Van Loben Sels v. Reclamation Dist. No. 551, 117 Cal. 114, 48 Pac. 1016 (1897).

Formation of drainage or sanitary district by special act is not within the prohibition of Constitution that cities, towns, and villages shall not be incorporated by special legislation. Owners of Lands v. People ex rel. Stookey, 113 Ill. 296 (1885); Wilson v. Board of Trustees of Sanitary Dist. of Chicago, 133 Ill. 443, 27 N. E. 203 (1890).

As to creation of drainage districts by special laws, see note, III, to People ex rel. Chapman v. Sacramento Drainage District, *ante*, p. 115.

2. Legislature Judge of Necessity for.

The legislature is the sole judge of when a general law will not subserve the purpose as well as a special act, or it has at least, a sound discretion to determine such a question. Davis v. Garnis, 48 Ark. 348, 3 S. W. 184 (1887); Keel v. Board of Directors of St. Francis Levee Dist., 59 Ark. 513, 27 S. W. 590 (1895).

The clause in the Constitution that when a general law can be made applicable, no special law shall be enacted, is addressed to the legislature, and is not the subject of review by the courts. People v. Harper, 91 Ill. 357 (1878); Wilson v. Board of Trustees of Sanitary

convenience, and general welfare by leveeing, ditching the lands of the state * * * for the changing of natural water courses to secure the better drainage * * * and providing for the assessment and costs therefor," etc.

The statute provides that the board of supervisors of the county may create a drainage district. The board of supervisors appoints three commissioners to classify the lands benefited and assess the benefits, giving the owners notice of a time and place for hearing said report, after which the levies are made to defray the expenses of said ditch or change of the water course. The lands are to be classified by tracts of forty acres or less, according to the legal or recognized subdivisions. From

Dist. of Chicago, 133 Ill. 443, 27 N. E. 203 (1890).

D. By Implication and Recognition.

Held that a reclamation district is created by implication, although proceedings to form it may be defective, where the legislature recognized it as such in providing by subsequent statute that all warrants drawn by it should bear interest, and a statute that all assessments due it should bear interest. People v. Reclamation Dist. No. 108, 53 Cal. 346 (1879).

A reclamation district is a public corporation for municipal purposes, and the creation thereof may be shown by acts recognizing its existence. Swampland Dist. No. 150 v. Silver, 98 Cal. 51, 32 Pac. 866 (1893).

A reclamation district is a public corporation; it may be created under general laws or by special act or implication of the legislature, and where the district is recognized in subsequent legislation as such a district it is conclusive proof that the corporation existed at the time of such recognition. Reclamation Dist. No. 124 v. Gray, 95 Cal. 601, 30 Pac. 779 (1892).

If the legislature acting under the Constitution should by special law create a municipal corporation, which for some reason lacked validity, the legislature having the power thus to create the corporation could, by ratification or recognition of its corporate existence, erect it into a valid municipality, and the legislature can, notwithstanding the irregularity of the creation of a reclamation district, give it a legal existence by positive acts of recognition. People ex rel. Silva v. Levee Dist. No. 6 of Sutter County, 131 Cal. 30, 63 Pac. 676 (1900).

II. With Regard to Certain Constitutional Provisions.

A. Impairing Obligations of Contract.

Obligation of contract is not impaired by the state changing its plans for the reclamation of overflowed lands and creating new and different agents and mandatories. People ex rel. Chapman v. Sacramento Drainage District, 155 Cal. 373, 103 Pac. 207, *ante*, p. 107.

The creation of a drainage district and the assessment of lands therein does not impair the obligation of any contract between the United States and the state created by the Arkansas Act. In re Tuthill, 36 App. Div. 492, 55 N. Y. Supp. 657 (1899).

An act forming a company to drain certain lands situated in the rear of the City of New Orleans, and imposing a tax equal to the cost of drainage, with ten per cent. interest, upon the lands drained, does not contravene section 10 of article 1 of the Federal Constitution that no state shall pass any law impairing the obligation of contracts, and thereby no rights or obligations of the owners and the former proprietors from whom they obtained title are impaired.

the action of the commissioners and board of supervisors, an appeal may be taken to the state district court. The drainage district, being designated as No. 1, was created by the board of supervisors in 1905, and soon thereafter commissioners were appointed, resulting in the assessment of the Chicago, Burlington & Kansas City Company in the sum of $3,000, and the Keokuk & Western Company in the sum of $4,000, making the sum of $7,000 against the Chicago, Burlington & Quincy Railroad Company, the owner. The Chicago, Burlington & Quincy Railroad Company was only an operating company, and has no interest in these cases.

New Orleans Draining Company Praying for the Confirmation of Tableau, 11 La. Ann. 338 (1856).

A drainage law which gives a lien for assessment superior to liens of existing incumbrances, is not unconstitutional as violating the obligation of contracts or devesting vested rights. Every property owner holds his property subject to the exercise of the taxing power, and it is immaterial what may be the nature of his interest, whether the fee or some lesser estate. Wabash Eastern Railroad Co. of Illinois v. Commissioners of East Lake Fork Special Drainage Dist., 134 Ill. 384, 25 N. E. 781 (1890).

A constitutional provision prohibiting the impairment of obligation of contract, and requiring due process of law, is not violated by a statute providing that an assessment shall be a first lien upon the land and that such lien takes precedence over a mortgage lien. Baldwin v. Moroney, 173 Ind. 574, 91 N. E. 3 (1910).

B. Due Process of Law.

1. What Is Due Process.

Proof of existence of a district as a corporation *de facto* is not sufficient to sustain an assessment and deprive owners of their property where they have been given no notice or opportunity to be heard. Reclamation District No. 537 v. Burger, 122 Cal. 444, 55 Pac. 156 (1898).

For the legislature to form a corporation for the purpose of draining certain lands and provide for the appointment of commissioners to enter into a contract with such corporation, and levy assessment upon the lands drained to pay the contract price, amounts to the taking of private property without due process of law, and is therefore unconstitutional. Coster v. The Tidewater Company, 18 N. J. Eq. (3 C. E. G.) 54 (1866).

A statute giving no appeal from a decision of commissioners as to whether or not land is benefited is not unconstitutional as depriving owners of property without due process of law. Ross v. Supervisors of Wright County, 128 Iowa 427, 104 N. W. 506, *ante*, p. 358.

The authority to compel local improvements at the expense of those to be immediately benefited is not taxation, though referable to the taxing power; nor does the enforcement of a valid tax, by whatever method, constitute a taking of property without due process of law in the sense of the Constitution, nor a taking of private property for public use. Hagar v. Board of Supervisors of Yolo County, 47 Cal. 222 (1874).

As to requirement of notice before taking of property by due process of law and questions in connection therewith, see note to Ross v. Board of Supervisors of Wright County, *ante*, p. 358.

2. Injunction Lies If Denied.

A drainage district cannot take or destroy private property without due process of law, and if it attempt so to do, an injunction will lie. Board of Drainage Com'rs of Petiteanse Drainage

In 1907, additional assessments were made against the railroad company, aggregating $2,333.33. The company filed claims for damages on account of bridging the new channel in both places, claiming in excess of $30,000, and was allowed about two hundred dollars. Appeals to the state district court were taken, and afterwards the cases were removed to this court. So that in this court there are four cases, one as to each road covering both assessments of alleged benefits, and one as to each road covering alleged damages on account of the bridging.

The legislature in 1907 (chapter 95, p. 100, Acts 32d Gen. Assem.) amended the former statute hereinbefore referred to. One section provides that the company shall make said ditch or channel across its right

Dist. v. Iberia & Vermilion R. Co., 117 La. 940, 42 So. 433 (1906).

C. Equal Rights and Privileges.

In a provision for the collection of an assessment upon land of resident owners by proceedings in court, and against land of nonresident owners as other taxes are collected, there being no discrimination in amount of assessment, it being according to benefits, there is no conflict with section 2, article IV of the Federal Constitution, guarantying the rights and privileges of citizens in the several states. Cribbs v. Benedict, 64 Ark. 555, 44 S. W. 707 (1897).

D. Guaranty of Jury Trial.

1. May Be Denied.

Denial of jury trial on the questions whether a proposed drainage district is a public benefit and whether certain lands will be benefited and are therefore proper to be included in the district, is not a violation of the constitutional provision that the right of trial by jury shall remain inviolate. Bankhead v. Brown, 25 Iowa 540 (1868); Sisson v. Board of Supervisors of Buena Vista County, 128 Iowa 442, 104 N. W. 454, vol. 3, this series.

Jury trial may be denied in drainage proceedings and the fact that no jury is allowed on the question of what lands are benefited does not deny due process of law. Ross v. Supervisors of Wright County, 128 Iowa 427, 104 N. W. 506, *ante*, p. 358.

The power of the legislature to provide in special proceedings, such as proceedings for the formation of drainage districts, etc., that the trial shall be by the court, and not by jury, is fully established. Lipes v. Hand, 104 Ind. 503, 1 N. E. 871 (1885).

When compensation or damage for lands taken for drainage purposes has been constitutionally fixed and ascertained, the legislature may lawfully direct the mode and manner of assessing or apportioning said damages upon the persons or property benefited thereby, and may designate or appoint the persons to make such assessment or apportionment. People ex rel. Cook v. Nearing, 27 N. Y. 306 (1863).

2. Contra.

Unless a right of appeal from a decision of trustees to a tribunal in which trial by jury may be had is given, the law is void as contravening the constitutional provision that the "right of trial by jury shall remain inviolate * * * and no person shall be deprived of life, liberty or property without due process of law." Fleming v. Hull, 73 Iowa 598, 35 N. W. 573 (1887).

E. Equal and Uniform Taxation.

A special assessment for local improvement is not double taxation, for it is levied for the special benefit the land

of way, the expenses therefor being allowed the company as its damages, but it shall be allowed no damages on account of bridging. The statutes in question are consistent with the State Constitution, as held by the state supreme court, and at a time before any rights or burdens imposed in the present litigation. Ross v. Board of Supervisors, 128 Iowa 427, 104 N. W. 503, 1 L. R. A. (N. S.) 137; Sisson v. Board of Supervisors, 128 Iowa 442, 104 N. W. 454, 70 L. R. A. 440. Therefore this court will not consider that question. And that the statute of the Thirty-Second General Assembly is retroactive is not a valid objection thereto, as recognized by all the profession, and as the cases

receives from the improvement in addition to the general benefits for which general taxes are levied. People ex rel. Chapman v. Sacramento Drainage District, 155 Cal. 373, 103 Pac. 207, *ante*, p. 107.

A constitutional provision that taxation shall be equal and uniform, and which prescribes the mode of assessment and persons by whom it shall be made, and that all property shall be taxed, has no application to an assessment levied for local improvement. Hager v. Supervisors of Yolo County, 47 Cal. 222 (1874); Turlock Irr. Dist. v. Williams, 76 Cal. 360, 18 Pac. 379 (1888).

A constitutional provision that the legislature shall provide for a uniform and equal rate of taxation and for a just valuation of all the property of the state, and prohibiting local laws authorizing taxation, does not prohibit local taxation for objects in themselves local. Anderson v. Kerns Draining Co., 14 Ind. 202 (1860).

The legislature has power to require, if possible, the proprietors of marshy lands to drain them. It has power also, for sufficient causes, of which it alone is the judge, to cause the work to be done and charged to the proprietors respectively, and this is not the levying of a tax in the sense of that word as used in a constitutional provision requiring all taxation to be equal and uniform. New Orleans Draining Company Praying for the Confirmation of Tableau, 11 La. Ann. 338 (1856).

The law authorizing town trustees to enter upon a system of drainage when the same is demanded by or would be conducive to the public health, convenience, and welfare, is not subject to constitutional objections of eminent domain and uniform taxation. Sessions v. Crunkilton, 20 Ohio St. 349 (1870).

A law providing a tax upon property within a certain district for the purpose or erecting and preserving levees, is not contrary to the provision of the Constitution requiring that all taxation shall be equal and uniform. That provision applies to taxes levied by the state and by counties for general purposes, and does not prohibit local taxes or assessments for local improvements. Daily v. Swope, 47 Miss. 367 (1872).

As to taxation as source of power of legislature to establish drains, see note, V, to Coffman v. St. Frances Drainage District, p. ——, vol. 3, this series.

F. Taking Private Property for Public Use.

Where there is no benefit, but a damage, to the land from the improvement, it is a taking of private property without compensation, and hence void. Coffman v. St. Frances Drainage District, 58 Ark. 54, 103 S. W. 179, p. ——, vol. 2, this series.

The enforcement of a valid tax by whatever method, does not constitute a taking of private property for public use. Hagar v. Board of Supervisors of Yolo County, 47 Cal. 222 (1874).

cited in the opinion of the Ross Case above referred to on page 432 of 128 Iowa, page 503 of 104 N. W., and page 137 of 1 L. R. A. (N. S.), clearly demonstrate. The regularity of the proceedings herein so closely follows the statutes that any argument with reference thereto would carry us into many details with but little interest, and serve no purpose.

The substantial questions in the cases are two in number.

1. Is the railroad company entitled to compensation for erecting a bridge where each of its roads cross the new ditch or channel? The company claims that, when it built its roads, it erected bridges for each across the Chariton River, and has maintained them ever since. And now to compel it to erect another bridge for each road at an

As to rule that public benefit must ensue before private property can be taken for drainage purposes and various questions in relation thereto, see note to Campbell v. Youngson, p. ——, vol. 2, this series.

As to taking property for drainage on ground of general public good, see note, F, 1, to Coffman v. St. Frances Drainage District, p. ——, vol. 3, this series.

As to taking property for drainage on ground of adding to tillable area of state see note, F, 2, to Coffman v. St. Frances Drainage District, p. ——, vol. 3, this series.

As to taking property for drainage on ground of economical management of same, see note, F, 3, to Coffman v. St. Frances Drainage District, p. ——, vol. 3, this series.

As to taking property for drainage on ground of mere benefit to proprietors, see note, F, 4, to Coffman v. St. Frances Drainage District, p. ——, vol. 3, this series.

G. Provisions Regarding Elections.

1. General Laws Do Not Apply.

An act creating a drainage district and providing for commissioners thereof is not void as creating an illegal municipal corporation in which the officers are not elected by the people. Owners of Lands v. People ex rel. Stookey, 113 Ill. 296 (1885).

The formation of a reclamation district is not unconstitutional as requiring a property qualification as a right to vote. As these districts are not municipal corporations, no one is a voter in the sense of the constitutional provision. There can be no electors when there are no residents within the district, it being but part of a scheme for conducting a public work and not a self-government. That the owners elect trustees or a committee of their number to superintend the work does not constitute an exercise of the elective franchise, which is the matter to which the constitutional provision has reference. The general public has an interest in the reclamation of swamp and overflowed land, nevertheless it is one of those public enterprises which results in a benefit to private lands, and therefore the cost is made a charge upon the land. That those who are specially interested and who must pay for the improvement are heard upon the question as to whether it shall be done, and are permitted to appoint those who shall superintend it, is not unusual nor does it constitute an exercise of the elective franchise. People ex rel. Van Loben Sels v. Reclamation Dist. No. 551, 117 Cal. 114, 48 Pac. 1016 (1897).

A provision that in an election in a drainage district, any person may cast one vote for each acre of land or fraction thereof, and for each platted lot which he may own or have an easement in, does not contravene the constitutional provision that all elections shall be free and that there shall be no hinderance

expense of near $40,000, without reimbursing it, is claimed to be taking it without compensation, and therefore void as being unconstitutional. I have given this question the consideration its great importance demands. As will be noticed, the title of the statute, as to the purpose thereof, is for the public health, convenience, and general welfare of the public. While it enhances the value of property, the purposes are those for health and convenience. And it is known by all persons that a swampy, marshy, and overflowed country is not healthy; that at times such a country is impassable, and at other times is inconvenient for the people to cross. And such a country drained eliminates those things, and is conducive to the welfare. And, in bringing those desired situations about,

or impediment to the right of a qualified voter to exercise the elective franchise, or that every male person of the age of twenty-one years or upwards belonging to certain classes shall have the right to vote, as these provisions do not apply to elections in local subdivisions such as drainage districts. State ex rel. Harris v. Hanson, 80 Neb. 274, 115 N. W. 294 (1908).

2. Property Qualification.

The public has an interest in the reclamation of swamp lands which results, however, in a benefit to private lands, and therefore the cost is made a charge upon such land. Those who are specially interested and who must pay for the improvement are heard upon the question as to whether it shall be done, and may appoint those who shall superintend it. This is not strictly an exercise of the elective franchise, and no one within such district is a voter in the sense of the constitutional provision. There may be no residents of the district, and therefore there can be no electors. It follows that the law is not void because it requires a property qualification for voters. People ex rel. Van Loben Sels v. Reclamation District No. 551, 117 Cal. 114, 48 Pac. 1016 (1897).

Property qualification in order to be a voter at elections in drainage districts does not violate a constitutional inhibition against requiring property qualifications for voters. The legislature permits the landowners to appoint their own agents, and the method which it imposes in making the selection is wholly within its own control. People ex rel Chapman v. Sacramento Drainage District, 155 Cal. 373, 103 Pac. 207, *ante*, p. 107.

The constitutional provision prohibiting property qualification does not prohibit the creation of drainage districts and election of trustees by property owners, as such prohibition extends only to constitutional and statutory officers. State ex rel. Gilson v. Monahan, 72 Kan. 492, 84 Pac. 130, 115 Am. St. Rep. 224 (1905).

A statute requiring a petition by resident owners is construed to mean owners resident of state, and not those residing upon lands sought to be embraced within the district. Any other construction would frequently defeat the object of the law. In re Drainage Dist. No. 1 of Harlan County, Captain v. Dailey, 84 Neb. 487, 121 N. W. 462 (1909).

3. Cumulative Voting.

A provision for cumulative voting at election of trustees of sanitary district is not void or in derogation of the constitutional provision that every male citizen of the United States over the age of twenty-one years and possessing the requisite qualifications as to residence, etc., shall be entitled to vote at elections. People ex rel. Longenecker v. Nelson, 133 Ill. 565, 27 N. E. 217 (1890).

the expense is distributed against those who will be benefited as much or more than the burden assessed against them. So that, generally speaking, those who bear the expense suffer no injury, but are largely benefited thereby. But the railway company contends that, after having built its bridges across Chariton River, it should not now be required to build another bridge for each of its roads without being reimbursed. Reliance is made upon the case of Mason City & Ft. Dodge Railroad v. Board of Supervisors (by the Iowa Supreme Court, June 10, 1908), as reported in 116 N. W. 805, in which it was held that the railroad company should be given damages for the cost of the additional bridge occasioned by the ditch. The following observations are pertinent to that case, by reason of which it is not to be followed by this court in this case. It was not only decided after the benefits were created and the burdens imposed in the cases at bar, but was decided after the cases were

H. Creation of Corporation by Special Laws.

As to creation of drainage districts by special laws not being contrary to constitutional inhibition against creating corporations by special laws, see note III, to People ex rel. Chapman v. Sacramento Drainage District, *ante*, p. 115; also I, C, *supra*, this note.

I. Loan of Credit.

An act providing for reclaiming of swamp and overflowed lands, the cost thereof to be paid by assessment upon the county at large to the extent of the benefit accruing to the whole county, to be determined by commissioners, and the balance by assessment upon the land benefited, is not contrary to the provision of the Constitution prohibiting a county from loaning its credit. Shelley v. St. Charles County, 17 Fed. 909 (1883).

J. Guarantying City's Right to Make Improvements.

A constitutional provision that the legislature may authorize corporate authorities of cities, towns, and villages to make local improvements and pay for the same by special assessment of the property benefited, does not prohibit the legislature from conferring the power to make local improvements by special assessments or taxation upon property benefited upon other municipal corporations than those designated. State ex rel. Abbott v. Dodge County, 8 Neb. 124, 30 Am. Rep. 819 (1879); Darste v. Griffin, 31 Neb. 668, 48 N. W. 819 (1891); Dodge v. Acon, 61 Neb. 376, 85 N. W. 292 (1901); Drainage Dist. No. 1 of Richardson County v. Richardson County, 86 Neb. 355, 125 N. W. 796 (1910).

The act creating a corporation with powers to drain certain lands in the rear of the City of New Orleans does not violate the provision of the Constitution that citizens of the City of New Orleans shall have the right of appointing the several public officers necessary for the administration of the police of said city, pursuant to the mode of elections which shall be prescribed by the legislature, as this section was adopted for the purpose of guarantying to the City of New Orleans a form of city government and the election of its principal officers, and was not intended to direct the manner in which contractors for works of public improvement should be elected, nor to abrogate contracts already made. An incorporated company taking a contract for the draining of a swamp cannot be called a public officer neces-

submitted for decision. Under these circumstances a national court will not follow blindly the decision of the highest court of the state in construing state statutes or a State Constitution. City of Ottumwa v. City Co., 119 Fed. 315, 56 C. C. A. 219, 59 L. R. A. 604.

In the case at bar, the territory now drained and heretofore drained is nearly 500,000 acres. The water from that territory all went down Chariton River except in high water, when it went out over the bottom, and in time back into and down the river. In the cited case by the Iowa Supreme Court, it inferentially at least, and I think fairly, appears that additional drainage and surface waters were carried down the valley as compared with prior waters. But the substantial reason for not following that case is the failure therein to observe and give weight to the two or more decisions of the Supreme Court of the United States, contented

sary for the administration of the police of the city. New Orleans Draining Company Praying for the Confirmation of Tableau, 11 La. Ann. 338 (1856).

The statute authorizing assessment by drainage district of benefits accruing to a highway within the district from the drainage improvement, is not in conflict with the constitutional provisions exempting the property of the state and county from taxation, nor that vesting the corporate authorities of cities, towns, and villages with power to make local improvements by special taxation or assessments against the property benefited. Drainage Dist. No. 1 of Richardson County v. Richardson County, 86 Neb. 355, 125 N. W. 796 (1910).

K. State Engaging in Internal Improvements.

A law providing for the establishment of drains and the payment therefor by the townships and persons to be benefited thereby, is a provision for the benefit of the public health, and not repugnant to a constitutional provision prohibiting the state from engaging in internal improvement except upon certain conditions. Gillette v. McLaughlin, 69 Mich. 547, 37 N. W. 551 (1888).

The fact that a drain is established by using a running stream and deepening and widening it, does not make it an internal improvement within the prohibition of the Constitution that a state shall not engage in work of internal improvement. Smith v. Carlow, 114 Mich. 67, 72 N. W. 22 (1897); Brady v. Hayward, 114 Mich. 326, 72 N. W. 233 (1897).

An act providing for local improvements and assessment upon lands benefited does not contravene a provision of a constitution that no money from the treasury shall be appropriated to objects of internal improvement unless a bill for that purpose shall be approved by two-thirds of both branches of the legislature, as such provision applies only to the public moneys in the public treasury. Alcorn v. Hamer, 38 Miss. 652 (1860).

III. Power to Delegate Authority.

A. May Act Direct or Delegate.

1. General Rule.

The legislature may determine benefits or assessments to be placed upon lands in districts which it forms for public improvement, or it may delegate that duty to an inferior tribunal, and when that duty is performed by the inferior tribunal it is an agency carrying out the legislative will. Caton v. Western Clay Drainage Dist., 87 Ark.

with mentioning and attempting to distinguish the one case in the lower court (212 Ill. 103, 72 N. E. 219), and failing to observe the decision on appeal as reported in Chicago, B. & Q. R. Co. v. People, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. Ed. 596.

That regard be had to the public welfare, as the "highest law," is an old-time maxim, sound in principle and of the greatest importance to all persons, including owners of property. And with like thought the Supreme Court of the United States decided the case of Chicago, Burlington & Quincy Railroad Co. v. People of Illinois, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. Ed. 596. That case is not only a most interesting discussion of these questions, but, being an authority binding on this court, it must be followed if in point, and it is to be seen whether in point or not. Rob Roy Creek, in Illinois, a natural and living stream, was bridged by the railroad company sufficiently high and wide to then, and for years thereafter, carry the water through. Subsequently the drainage

8, 112 S. W. 145 (1908). See Carson v. St. Francis Levee Dist., 59 Ark. 513, 27 S. W. 590 (1894); Coffman v. St. Francis Drainage Dist., 83 Ark. 54, 103 S. W. 179 (1907); Sudberry v. Graves, 83 Ark. 344, 103 S. W. 728 (1907); Craig v. Board of Improvement of Russellville, Waterworks Imp. Dist., 84 Ark. 390, 105 S. W. 867 (1907); Road Improvement Dist. v. Glover, 86 Ark. 231, 110 S. W. 1031 (1908).

The fact that no appeal is provided from a decision of commissioners as to whether the public health or welfare will be promoted by the intended work does not render the law void. The legislature might have declared the marshes a nuisance, and taken steps for draining them. The question of necessity could not have been inquired into except where it was apparent that there was an attempt to evade the Constitution and advance some private scheme under the pretense of promoting the public health and welfare. The principle involved is analogous to taking property by right of eminent domain. The legislature may determine the necessity of the exercise of the power and the extent to which the exercise shall be carried, or it may delegate the exercise of that right to officers or corporations. State ex rel. Baltzell v. Stewart, 74 Wis. 620, 43 N. W. 947, 6 L. R. A. 394 (1889).

2. Legislature to Prescribe Mode and Agency.

In the absence of constitutional prohibition, there is no limitation upon the legislature as to the mode of forming drainage districts or the agencies to be employed in their creation. Thus, the legislature may give the county power to form the districts or vest the power in the highway commissioners of the town or in persons selected from two boards of highway commissioners or county commissioners of a county, or corporate authorities of towns, cities or villages, or the legislature may create another corporation within either and define its powers and determine the agencies through and by which its powers may be exercised. The mode and agency through and by which the special assessment is to be imposed is left wholly to legislative discretion, and when it has chosen and designated the agency, its selection is conclusive. People v. Drainage Comm'rs of Dist. No. 1 of Young America, 143 Ill. 417, 32 N. E. 688 (1892).

board adopted plans requiring a larger opening. And it was held:

"(1) The rights of a railroad company to bridge over a natural water course crossing its right of way, acquired under its general corporate power, are not superior and paramount to the right of the public to use that water course for draining lands.

"(2) Although the opening may be sufficient at the time the bridge is built to carry the waters, yet there is an implied duty on the part of the company to maintain an opening adequate and effectual for such increase in the volume of the water as may result from reasonable regulations established from time to time by public authority for the drainage of the adjacent territory.

"(3) It is the duty of the railway company at its own expense to erect and maintain a new bridge of such capacity as to carry the water through."

The three propositions just enumerated were decided by that court in that case, and I submit there are no distinctions of a controlling character between that case and those now for decision. If, in the case now in hand, the drainage board had planned the ditch to cross the right

If the use for which property is taken be to satisfy a great public want or public exigency, it is a public use within the meaning of the Constitution, and the state is not limited to any given mode of applying that property to satisfy the want or meet the exigency. Gilmer v. Lime Point, 18 Cal. 229 (1861); Turlock Irr. Dist. v. Williams, 76 Cal. 360, 18 Pac. 379 (1888).

3. May Require Judicial Investigation.

The act providing for the filing of a petition, etc., in the district court, and that upon hearing the court may by order declare the drainage district a public corporation, may exclude such lands as will not be benefited and declare the remainder a drainage district as prayed for, does not conflict with the constitutional provision dividing powers of state into three departments. The power of the legislature over the subject of procedure within limits not impairing the inherent powers of jurisdiction of the courts is not restricted, and it is competent to require by statute a preliminary judicial ascertainment of facts the existence of which is made a condition precedent to the creation of a public corporation. Bonds v. Minor, 80 Neb. 180, 114 N. W. 146 (1907); Drainage Dist. No. 1 of Richardson County v. Richardson County, 86 Neb. 355, 125 N. W. 796 (1910).

B. May Delegate to Any Tribunal or Officer or Form Districts.

1. General Rule.

The authority to establish reclamation districts may be delegated or lodged in any board or tribunal which the legislature may designate. The expense of such works may be charged against the parties specifically benefited and be made a lien upon their property. All that is required in such case is that the charges shall be apportioned in some just and reasonable mode according to the benefits. Turlock Irr. Dist. v. Williams, 76 Cal. 360, 18 Pac. 379 (1888).

Drainage of swamps, overflowed lands, etc., may be done through corporations or county, township, or other boards, or by creating districts; and the power to determine what shall be the taxing district is a legislative power, not restricted except by constitutional limitation. The benefit of the highway or levee or drain may be so peculiar that justice would require the cost to be levied upon a part of the township or

of way of the company at the point of the old channel, or side by side thereof, then the strongest glass would not enable any one to see a difference between the cited case and the cases at bar. But it is urged with earnestness that, because the ditch is a mile or more away from the old channel, the case is not in point, and that is a distinction I fail to see. By locating the ditch a mile distant, the company will either have two short bridges for each road to maintain, or if all the water is turned from the old channel into the new one, the company will still have but the one bridge with an opening to carry the water.

In Chicago, Burlington & Quincy Railroad v. City of Chicago, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979, it was held that the company could recover but nominal damages for the opening of a new street across the right of way of the company, notwithstanding the large expense incurred thereby to the company. In the case of Railroad Co. v. Bristol, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. Ed. 269, the supreme court held that, although the state consented when the road was constructed

county or upon parts of such subdivisions of the state. In re Madera Irr. Dist., 92 Cal. 296, 28 Pac. 272, 675, 14 L. R. A. 755, 21 Am. St. Rep. 106 (1891); State v. Freeman, 61 Kan. 90, 58 Pac. 959, 47 L. R. A. 67 (1899); Wulf v. Kansas City, 77 Kan. 358, 94 Pac. 207 (1908).

The power to determine by whom the affairs of a drainage district are to be administered is entirely within the power of the legislature to prescribe. Mayor, etc. of Town of New Iberia v. New Iberia & Bayou Carlin Drainage Dist., 106 La. 651, 31 So. 305 (1901).

The duty of one owner of swamp lands is the duty of all, and in order to effectually enter upon and carry out any feasible system of drainage through the infected district all such owners may be properly grouped together to bear the general assessments for the entire cost proportionately, and assessment in such case is not taxation. Donnelly v. Decker, 58 Wis. 461, 17 N. W. 389, 46 Am. Rep. 637 (1883).

The fact that the powers vested in drainage commissioners could well have been exercised by the county board of supervisors, does not prohibit the legislature from providing for such commissioners. State ex rel. Baltzell v. Stewart, 74 Wis. 620, 43 N. W. 947, 6 L. R. A. 394 (1889).

2. To Commissioners.

In the absence of constitutional provisions, the assessment for the benefit of lands from drainage can rightfully be made by commissioners, under authority of the legislature. The persons by whom and the mode of making the assessment are subject only to legislative discretion. People ex rel. Cook v. Nearing, 27 N. Y. 306 (1863).

Power to fix boundaries of a district and determine what lands are benefited thereby and shall be included therein, may be delegated to commissioners. State ex rel. Baltzell v. Stewart, 74 Wis. 620, 43 N. W. 947, 6 L. R. A. 394 (1889).

But the legislature cannot delegate to commissioners power to divide the state into such drainage districts as they may in their discretion see fit. People v. Parks, 58 Cal. 624, 642 (1881).

3. To Corporations.

Where the legislature has power to drain a swamp directly or by its own

that the grade crossings could be put in, later the road should be compelled at its expense to take out the grade crossings and put in viaducts or subways. Other cases are cited in the opinion referred to, but these suffice. Whatever promotes the health, the safety, the convenience, and the welfare, limited to certain lines, is an exercise of the police power, for which property without compensation can be taken, and expense and burdens can be imposed without an allowance of the equivalent by way of damages. Believing that the cases at bar are in all respects in principle like the cases passed on by the supreme court, the company is denied all damages, other than removing the embankment for the ditch. And for this, damages were allowed by the board of supervisors.

2. The other and remaining question is, Can the drainage authorities assess the railroad company for real or supposed benefits because of the new channel, and, if so, are the assessments in these cases fair and equitable? And this question is in some respects quite different from the other, as, of course, if there are no benefits, there can be no

agents, it has the power to do it through the intervention of a company created for that purpose. New Orleans Draining Company Praying for the Confirmation of Tableau, 11 La. Ann. 338 (1856).

4. To Districts.

It is competent for the state to authorize the creation of governmental agencies for enforcement of the police power and for the legislature to clothe county supervisors or other administrative officers or boards with authority to establish districts for reclamation of swamp, overflowed or wet lands, or lands so subject to inundation as to destroy their utility or to constitute a menace to the public health. The fact that such bodies of land may extend into two or more counties does not render the legislature powerless to include continuous tracts in one district. It may delegate power to any board or tribunal it sees fit. Hager v. Reclamation Dist., 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569 (1884); Reclamation Dist. v. Hager, 66 Cal. 54, 4 Pac. 945 (1884); Shaw v. State, 97 Ind. 23 (1884); Updegraff v. Palmer, 107 Ind. 181, 6 N. E. 353 (1886); Hudson v. Bunch, 116 Ind. 63, 18 N. E. 390 (1888); State ex rel. Sheffer v. Fuller, 83 Neb. 784, 120 N. W. 495 (1909).

The statute authorizing a board of supervisors of a county to create a drainage district, appoint commissioners, and classify the lands benefited and assess the benefits, giving the owners notice of a time and place for hearing the report, after which levies are made to pay expenses, is consistent with the Constitution of Iowa. Ross v. Board of Supervisors of Wright County, 128 Iowa 427, 104 N. W. 503, *ante*. 358; Sisson v. Board of Supervisors of Buena Vista County, 128 Iowa 442, 104 N. W. 454, vol. 3, this series; Chicago, B. & Q. R. Co. v. Board of Supervisors, principal case.

The drainage and reclamation of large tracts of swamp or overflowed land or submerged land is a matter of public utility and concern, for which the legislature may provide by the creation of local administrative organizations or political corporations. State ex rel. Harris v. Hanson, 80 Neb. 274, 115 N. W. 294 (1908).

A law having for its scheme to authorize the formation of drainage dis-

assessments. When a tribunal is empowered or directed to pass upon questions of fact, such findings are final and conclusive as to the facts, but not as to matters of law. Therefore the findings of the engineer and board as to the necessities of a new channel, to the end that the public health, convenience, and welfare would be promoted, and as to the location and benefits, and depth and breadth, of the new channel, are all findings of fact concerning which the courts can make no inquiry, much less review or set aside. Ryan v. Varga, 37 Iowa 78; Slack v. Blackburn, 64 Iowa 373, 20 N. W. 478; Martin v. Mott, 12 Wheat. 19, 6 L. Ed. 537; In re Commissioners of Aspinwall, 21 How. 539, 16 L. Ed. 208; Enterprise v. Zumstein, 67 Fed. 1000, 15 C. C. A. 153; cases cited in People's Bank v. Gilson (C. C.), 140 Fed. 1.

Of course, if the board exceeds its authority, or errs in matters of law, the courts will review. So that all questions in the case were before the board for decision, and its findings of fact will not be reviewed save only the question of benefits, and if the railroad company were benefited at all, then the amount of benefits in the first instance would be determined by the board, with the right of appeal to the courts only as to the amount. And that the company would be benefited in some sum,

tricts by the people of the district, authorizing that it manage the business thereof; permitting the organization of the district by a majority in interest of the resident owners of swamp and overflowed lands signing articles of association and submitting them to the circuit court with a petition praying for decree creating such district; providing for notice to all persons not joining in such petition; and for trial by the court, as to the necessity of such district; for fixing boundaries of the district including all land that would be benefited by such drainage; providing for the election by the people of a board of supervisors to manage the business of the district; the procurement by condemnation, if necessary, of the right of way for ditches, drains, etc.; for levying assessment not exceeding fifty cents per acre per year, for benefit, to pay expenses of survey, building, drainage, etc.: the appointment by the court of drainage commissioners whose duty it shall be to survey, locate, mark, estimate the cost of, and contract for construction of all such drains, etc., is not unconstitutional as authorizing the formation of a private corporation for the purpose of improving private property or forcing private individual persons to become members of such corporation, nor as assessing a tax against property for the improvement of all property in the district that is benefited by drainage, nor as discriminating between resident and nonresident owners without any corresponding benefit, nor as subjecting the land to burden and taxation without providing right of trial by jury. Mound City L. & S. Co. v. Miller, 170 Mo. 240, 60 L. R. A. 190, 94 Am. St. Rep. 727, 70 S. W. 721 (1902).

5. To Elected Officers.

Under constitutional provision empowering the legislature to "provide for the organization of drainage districts and vest the corporate authorities thereof with power to construct and maintain levees, drains, and ditches," etc., the

cannot be doubted from the evidence. Counsel for the company at the argument conceded some benefits, but vigorously contended that such benefits would be fairly measured by a few hundred dollars, instead of approximately $10,000, as fixed by the county authorities. Heretofore the railroad tracks have been overflowed, requiring the tracks to be repaired, and traffic delayed and suspended. So that the question is, What shall be the assessment? Because it is obvious that the overflow will be less with the channel straightened.

Practical men, as well as men educated as civil engineers, have testified in the case. Farmers residing in the neighborhood testified to what has occurred with reference to overflows and washing of the company's embankments and tracks. What the benefits to the company will be, necessarily is in a measure the subject of conjecture. Many phases of the work of a civil engineer can be stated with precision, for the reason that mathematics is an exact science. Other phases must be determined by opinion, and the opinion formed from observation and experience. It follows that the benefits to the railroad company from its eight miles approximately of railroad within the drainage district cannot be stated with certainty. The character of soil of the area drained, as to what per

legislature has all other powers necessary to make the general grant effective and to accomplish the results intended as incidental thereto. As to the mode in which the power is to be exercised, the legislature is left the sole judge, and the creating of highway commissioners already elected also drainage commissioners, is not unconstitutional. Kilgour v. Drainage Commissioners, 111 Ill. 342 (1884).

6. To Electors.

That the legislature may delegate to administrative officers the power to determine whether the particular proposed improvement will be conducive to public health, convenience and welfare, is an established rule. The same function may be delegated to the electors of a municipality. There is no reason why the property owners of a district established by county board could not be competent to determine for themselves whether or not they shall incorporate and thereby, at their own expense, establish a system of drainage and dyking for reclamation of land, the doing of which will be conducive to the public welfare. State ex rel. Harris v. Hanson, 80 Neb. 274, 115 N. W. 294 (1908).

7. To Police Juries.

In the absence of constitutional prohibition, the power of the legislature is supreme within its sphere, and it may delegate powers with regard to opening drains, to police juries. Avery v. The Police Jury of Iberville, 12 La. Ann. 554 (1857).

8. In Minor Municipalities.

That the legislative power for local purposes may be delegated to minor municipalities is a matter of universal recognition and constant practice. Ross v. Board of Supervisors of Wright County, 128 Iowa 427, 104 N. W. 506, *ante*, p. 358.

9. To Supervisors.

A state has power to delegate authority for the establishment of a reclamation district to supervisors of county

cent. of the rainfall will go into the ground, that depending on whether the ground is frozen or not, and depending still further on the time the rain is falling, and what rains have preceded, and to what extent, if any, the ground is already saturated, the season having much to do with the evaporation, and perhaps other things, make it impossible of precise calculation. Then, again, the worth of money as to rates of interest vary, as is known by all. But the assessments against the railroad company are calculated with as much definiteness as those against the farm lands.

But taking all things into account, it can be stated in fairness that the benefits to the company as a minimum will be $25,000. This being so, it cannot be judicially declared that the assessments should be modified. The result is that in the four cases judgments and decrees will be entered in harmony with the motion of the board of supervisors.

or of one county containing the greater part of the lands to be reclaimed. Such authority may be lodged in any board or tribunal which the legislature may designate. Hagar v. Reclamation District No. 108, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569 (1883).

IV. Power to Dissolve.

There is no express limitation in the Constitution upon the power of the legislature to dissolve a municipal corporation, if a swamp land district is such. A general law providing a method in which those interested may cause a corporation to be dissolved would not meet the case. It is a public agency called into existence to construct a public work, to do something which the general policy of the state requires to be done. The state changes its policy, revokes the agency, and thereby ends the corporation, which exists only for that purpose. People ex rel. Van Loben Sels v. Reclamation District No. 551, 117 Cal. 114, 48 Pac. 1016 (1897).

The legislature, having due regard to vested rights, may put all existing drainage or reclamation districts out of existence and create a board to manage all future reclamation. People ex rel. Chapman v. Sacramento Drainage District, 155 Cal. 373, 103 Pac. 207, *ante*, p. 107.

The act providing for the dissolution of a drainage district is not unconstitutional as impairing the obligation of a contract, nor in conflict with the constitutional provision that the general assembly may pass laws permitting the owners of lands to construct drains across the lands of others, etc., as such provision is not self-executing, and laws passed pursuant to it may be modified or repealed at any time, and contain none of the elements of a contract. Hollenbeck v. Detrick, 162 Ill. 388, 44 N. E. 732 (1896).

UNITED STATES v. LEE.

[Supreme Court of New Mexico, August 2, 1910.]

15 N. M. 382, 110 Pac. 607.

1. **Waters and Water Courses—Conflict of Laws—United States Statutes Not Inconsistent.**

The Act of Congress of February 15, 1901, providing for running telegraph lines, pipe lines, etc., through national parks and reservations, and the Act of March 3, 1891, providing for rights of way for irrigation ditches, etc., over public lands, are not inconsistent, and the later act does not repeal or modify the earlier.

2. **Same—Act of March 3, 1891, Grants an Easement.**

The Act of Congress of March 3, 1891, providing for rights of way for irrigation ditches, canals, etc., over the public lands of the United States, grants an easement which upon approval by the secretary of the interior, becomes permanent.

3. **Same—Act of February 15, 1901, Grants a Mere License.**

The Act of Congress of February 15, 1901, providing for telegraph lines, pipe lines, etc., through national parks and reservations, grants merely a license, which may be revoked at any time.

4. **Same—Irrigation Ditches on Unsurveyed Public Lands.**

Irrigation ditches, canals, etc., may be constructed upon the unsurveyed public lands, and maps and plats thereof are not required to be filed until twelve months after survey.

5. **Same—Approval of Secretary of the Interior.**

It is not necessary to secure the approval of the secretary of the interior before constructing irrigation ditches or canals upon the unsurveyed public lands which are not national parks or reservations, before construction can be made.

6. **Same—Adjudication of Rights of Settlers on Public Lands.**

The rights of settlers on the public lands cannot be adjudicated in a suit by the United States to restrain the maintenance of irrigation ditches on the public lands.

Suit by the United States for injunction against defendants maintaining certain ditches, canals, and pipe lines on the public lands of the

CASE NOTE.

Canals on Unsurveyed Government Land and Government Reservations.

United States, in violation of the laws of the United States and the rules and regulations of the Department of the Interior. Decree for defendants. Writ of error by plaintiff. Affirmed.

For plaintiff—W. H. H. Llewellyn.

For defendants—Hawkins & Franklin.

Plaintiff in error, hereafter referred to as plaintiff, filed its amended complaint on the 4th day of June, 1907, to which complaint a demurrer was filed by one of the defendants in error, Oliver M. Lee, challenging the sufficiency of the amended complaint. The complaint alleged substantially that in the County of Otero, Territory of New Mexico, and upon unsurveyed lands of the United States of America, the defendants, or some of them, have been, and are now, unlawfully maintaining certain ditches, canals, and pipe lines on the said public lands of the United States of America, which ditches, canals, and pipe lines are being maintained in violation of the laws of the United States and the rules and regulations promulgated by the Department of the Interior; that the defendants, together with their agents, servants, and workmen, have heretofore constructed, and are now unlawfully maintaining, irrigating ditches, canals, and pipe lines upon the public lands of the United States in the vicinity above described in the complaint, for the purpose of conducting waters from Dog Canon and San Andres Canon to certain lands now in the possession of the defendants; that in constructing and building said ditches, canals, and pipe lines the said defendants are unlawfully appropriating public lands of the United States without authority from the said United States or the secretary of the interior to build and construct any such canals, pipe lines or ditches through or over the said public lands; that the plaintiff is informed that defendants gave out and threaten to continue the building and constructing of said canals and ditches without authority of law, and to maintain the same and appropriate the waters from the said Dog Canon and said San Andres Canon and conduct the said water through said pipe lines and ditches over the public lands of the United States; that upon parts of the lands through which said canals, ditches, and pipe lines have been so constructed bona fide settlers have settled upon certain lands with the bona fide intention of entering the same at the proper land office when said lands shall have

I. In General.

A. Federal Acts Distinguished.

The Acts of March 3, 1891, and of May 14, 1896, differ so widely in the character of the estate granted as well as the uses to which the right of way may be devoted and the extent thereof, that an application cannot be properly allowed on the acts taken together. The

been surveyed and thrown open to entry, and the plaintiff further alleges that the defendants, their agents and servants, have no authority in law to go upon the public lands of the United States and construct any ditches, canals, and pipe lines for the purpose of conducting water, or for any other purpose without express authority of the secretary of the interior as provided by law for the giving of such authority, and the unlawful acts of the said defendants in so constructing such ditches and canals without authority will cause great loss and damage to the plaintiff, and that plaintiff has no adequate remedy except by injunction, which is prayed for, and a temporary writ of injunction was allowed.

In order that the acts of congress vital to a decision of this case may be before the court, at the outset sections 18, 19, 20, and 21 of the Act of Congress of March 3, 1891 (Act March 3, 1891, c. 561, 26 Stat. 1101, 1102 [U. S. Comp. St. 1901, pp. 1570, 1571]; 6 Fed. St. Ann., pp. 508, 509 and 510), are set out in full.

"Sec. 18. (Right of way through public lands and reservations to canal or ditch companies for irrigation.) That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any state or territory, which shall have filed, or may hereafter file, with the secretary of the interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof, also the right to take from the public lands adjacent to the line of the canal or ditch, material, earth and stone necessary for the construction of such canal or ditch. Provided, that no such right of way shall be so located as to interfere with the proper occupation by the government of any such reservation, and all maps of location shall be subject to the approval of the department of the government having jurisdiction of such reservation, and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective state or territories. (26 Stat. L. 1101.)

permission must rest upon one or the other. In re O'Melbeney, 24 Land Dec. 560 (1897).

B. Disposition of Waters Not Affected.

The provisions of the Act of 1891 deal only with the right of way over public lands to be used for purposes of irrigation, leaving the disposition of the water to the states. In re Sinclair et al., 18 Land Dec. 573 (1894).

C. Restricted to Irrigation.

The Act of March 3, 1891, restricts the purpose for which the right of way therein granted may be used to that of

"Sec. 19. (Maps to be filed—grants subject to right of way—damages to settlers.) That any canal or ditch company desiring to secure the benefits of this act shall, within twelve months after the location of ten miles of its canal, if the same be upon surveyed land, and if upon unsurveyed land, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located, a map of its canal or ditch and reservoir, and upon approval thereof by the secretary of the interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such right of way. Whenever any person or corporation, in the construction of any canal, ditch or reservoir, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage. (26 Stat. L. 1102.)

"Sec. 20. (Applicable to existing and future canals, etc.—forfeiture of noncompletion.) That the provisions of this act shall apply to all ditches, canals or reservoirs heretofore or hereafter constructed, whether constructed by corporations, individuals or association of individuals, on the filing of the certificates and maps herein provided for. If such ditch, canal or reservoir has been or shall be constructed by an individual or association of individuals, it shall be sufficient for such individual or association of individuals to file with the secretary of the interior, and with the register of the land office where said land is located, a map of the line of such canal, ditch or reservoir, as in case of a corporation, with the name of the individual owner or owners thereof, together with the articles of association if there be any. Plats heretofore filed shall have the benefit of this act from the date of their filing, as though filed under it. Provided: That if any section of said canal or ditch shall not be completed within five years after the location of said section,

irrigation, and maps of location will not be approved where it appears that the right of way is desired for any other purpose than that of irrigation. In re South Platte Canal & Reservoir Co., 20 Land Dec. 154 (1895); 20 Land Dec. 464 (1895); In re Shaffee County Ditch & Canal Co., 21 Land Dec. 63 (1895); In re Marr, 25 Land Dec. 344 (1897); In re Roe, 28 Land Dec. 573 (1899). Under Act of March 3, 1891, the right of way applied for must be for the purpose of irrigation. In re Town of Delta, 32 Land Dec. 461 (1904); Denver, Northwestern & Pacific R. Co. v. Hydro-Electric Power Co., 32 Land Dec. 452 (1904); In re Inyo Consolidated Water Co., 37 Land Dec. 78 (1908). But application need not be rejected because articles of incorporation of applicant allow it to do other things. In re Sierra Ditch & Water Co., 35 Land Dec. 154 (1906).

Company organized for generating and distributing power is not within the purview of the Act of March 3, 1891.

the rights herein granted shall be forfeited as to any incompleted section of said canal, ditch or reservoir, to the extent that the same is not completed at the date of the forfeiture. (26 Stat. L. 1102.)

"Sec. 21. (Rights granted only for canal use.) That nothing in this act shall authorize such canal or ditch company to occupy such right of way except for the purpose of said canal or ditch, and then only so far as may be necessary for the construction, maintenance and care of said canal or ditch. (26 Stat. L. 1102.)

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the secretary of the interior be and hereby is authorized and empowered under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest, and other reservations of the United States, and the Yosemite, Sequoia and General Grant National Parks, California, for electrical plants, poles and lines for the generation and distribution of electrical power, and for the telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits, or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: Provided, that such permits shall be allowed within or through any of said parts or any forest, military, Indian or other reservation only upon the approval of the chief officer of the

In re Kern River Co., 38 Land Dec. 302 (1909).

D. Railroad Grants.

When a citizen settles upon a part of the unsurveyed land of the United States, and has peaceable possession thereof, and constructs a ditch across the same, he secures the right of way therefor, although such land when surveyed is found to be within a grant of a railroad company. The purchaser of land from the railroad company does not thereby secure title to a ditch constructed prior to the survey. Childs v. Sharai, 8 Idaho 378, 69 Pac. 111 (1902).

II. On Unsurveyed Lands.

Irrigation ditches, canals, etc., may be constructed upon the unsurveyed public lands, and maps and plats thereof need not be filed until twelve months after survey. United States v. Lee, principal case.

department under whose supervision such park or reservation falls, and upon the finding by him that the same is not incompatible with the public interests; Provided further, that all permits given hereunder for telegraph and telephone purposes shall be subject to the provision of title 65 of the Revised Statutes of the United States, and amendments thereto, regulating rights of way for the telegraph companies over the public domain; and provided further, that any permission given by the secretary of the interior under the provisions of this act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to or over any public land, reservation or park." Act Feb. 15, 1901, c. 372, 31 Stat. 790 (U. S. Comp. St. 1901, p. 1584).

The demurrer to the amended complaint was argued by counsel and sustained by the court in an opinion rendered June 25, 1907. The demurrer having been sustained on the 25th day of June, 1907, said cause was dismissed, and on the 19th day of February, 1908, a *nunc pro tunc* decree to that effect was entered as of the date June 25, 1907. The cause is brought to this court by writ of error sued out on behalf of the plaintiff in the court below.

McFIE, J. (after stating the facts). There is but one question for determination in this case, and that is whether or not the defendants or Oliver M. Lee, the demurrant herein, could acquire a right of way for a canal, ditch, reservoir, or pipe line such as he contemplated constructing, or had partially constructed, on and over the unsurveyed public lands of the United States without first having obtained the permission of the department of the interior as provided by the statute in regard to surveyed public domain. In the lower court this seems to have been conceded to be the only question for the court's determination. In sustaining the demurrer, Justice Edward A. Mann, presiding judge of the Sixth Judicial District, in which this case arose, handed down a carefully considered opinion in which all of the statutes involved were

Rights of way for canals and reservoirs under the Act of 1891, on unsurveyed public lands, cannot be approved. In re Santa Cruz Water Storage Co., 13 Land Dec. 660 (1891); Instructions from Secretary of Interior, 14 Land Dec. 336 (1892); In re Sinclair, 18 Land Dec. 573 (1894).

Map will not be approved where the initial and terminal points are on unsurveyed land and the line for the greater part traverses unsurveyed lands and cannot be used independently of the other portions. In re Arrowhead Reservoir Co., 16 Land Dec. 148 (1893).

III. On Government Reservations.

A. In General.

The right of way is granted through reservations by section 18 of the Act of 1891, but the proviso thereof requires all maps of location to be submitted for approval to the department having jurisdiction over the reservation involved.

examined and applied to the case at bar, and, inasmuch as the opinion rendered by the lower court in our opinion states the law of the case correctly, such portions of the opinion as are deemed necessary to a determination of the case in this court will be in whole or in part restated here.

It becomes necessary for us to refer to, and to some extent consider, the sections above quoted of the Act of Congress of March 3, 1891, and also make reference to the Act of Congress of February 15, 1901, inasmuch as there is some contention in this case that the latter act materially modified or repealed those sections of the former act, and it is necessary for the court to ascertain whether this contention of the plaintiff in error is correct or not. The Act of March 3, 1891, is a very comprehensive act and governed the practice as to the obtaining of rights of way for canals, ditches, and reservoirs for many years, and it governed the obtaining of these rights of way over both surveyed and unsurveyed lands, and clearly defined the mode of obtaining those rights of way, depending upon whether the lands were surveyed or unsurveyed. Section 18, *supra*, contains a grant of right of way through the public lands and reservations of the United States to any canal or ditch company, duly organized, which shall file proof thereof, as prescribed, with the secretary of the interior, for ditches, canals, or reservoirs, including the right to take stone, earth, or other material necessary for the construction of such canal, ditch, or reservoir from the adjacent lands for the construction thereof, and section 20 makes these provisions applicable to individuals or associations. The language of this section is almost identical so far as the granting clause is concerned with section 1 of the Act of March 3, 1875, granting rights of way to railroad companies over the public lands (Act March 3, 1875, c. 152, 18 Stat. 482; 6 Fed. St. Ann. 501 [U. S. Comp. St. 1901, p. 1568]), and this has been held by the Supreme Court of the United States to grant to a railroad company which has actually constructed its road an absolute right of way over the public land superior to the rights of any subsequent entry of the land,

In re McKnight, 13 Land Dec. 165 (1891).

No rights are acquired by the application prior to the approval thereof. Opinion of Secretary of Interior, 32 Land Dec. 597 (1904).

The land department cannot approve an application under the Act of March 3, 1891, which materially conflicts with vested rights under an application theretofore granted. Allen v. Denver Power & Irrigation Co., 38 Land Dec. 207 (1909).

The jurisdiction of the land department is lost on approval of application under Act of March 3, 1891. It can only be annulled or canceled by action in the courts. Allen v. Denver Power & Irrigation Co., 38 Land Dec. 207 (1900); In re Sullivan, 38 Land Dec. 493 (1910).

Granting right of way through forest reserve is within the discretion of the

although the required profile maps had not been filed as provided by section 4 of the Act. Jamestown & Northern Ry. Co. v. Jones, 177 U. S. 125, 20 Sup. Ct. 568, 44 L. Ed. 698; W. & I. R. Co. v. Coeur d'Alene R. & N. Co. (C. C.) 52 Fed. 765. In the case at bar the lands are unsurveyed lands, and under the provisions of section 19, *supra,* no maps or plats are required to be filed until within twelve months after the lands have been surveyed. It is alleged in the complaint, however, that the ditches, etc., of the defendants have already been constructed and are now being maintained, so that the same condition prevails as in Jamestown & Northern Ry. Co. v. Jones, *supra,* except that in the case here the lands are unsurveyed. In that case a distinction is drawn between constructed roads and proposed roads desiring to acquire rights of way prior to construction on surveyed lands, and the actual construction of the road is held to answer the purpose of filing the profile maps by giving notice of the tract claimed as such right of way; but the court says, quoting from Secretary Vilas, in Dakota Central Ry. Co. v. Downey, 8 Land Dec. Dep. Int. 115, 118: "As to the roadway, the construction of the road fixes the boundaries of the grant and fixes it by the exact rule of the statute. * * * This must undoubtedly be the rule when the road is constructed over surveyed lands, because then every condition necessary to the vigor of the present grant is complied with." The act under consideration (Act March 3, 1875) contained an almost identical clause with reference to the filing of maps in case of unsurveyed lands within twelve months after the survey thereof by the United States. The department of the interior, in its regulations concerning rights of way for canals, ditches, and reservoirs, issued September 28, 1905 (which it will be observed is after the passage of the Act of February 15, 1901), says at section 16: "Maps showing canals, ditches and reservoirs wholly upon unsurveyed lands, may be received and placed on file in the general land office and the local land office in the district in which the same is located, for general information, and the date of filing will be noted thereon; but the same will not be submitted to nor approved by the secretary of the interior, as the act makes no provision for the approval of any but maps showing the location in

land department. In re Sierra Ditch & Water Co., 38 Land Dec. 547 (1910).

B. Indian Reservations.

Right of way may be granted under provisions of Act of March 3, 1891, through Indian reservations. Opinion to Director of Geological Survey, 33 Land Dec. 563 (1905).

Under Act of March 3, 1891, right of way may be granted through lands in Indian reservation allotted to individual Indians. In re Fresnol Water Right Canal, 35 Land Dec. 550 (1907).

An application will not be approved where it is across lands formerly embraced within an Indian reservation unless such lands have been surveyed. A

connection with the public surveys. The filing of such maps will not dispense with the filing of maps after the surveys of the lands and within the time limited in the act granting the right of way, which maps, if in all respects regular when filed, will receive the secretary's approval." From this provision of the regulations issued as late as 1905 or about four years after the Act of February 15, 1901, was passed, the interior department recognizes that congress intended that any person may go upon unsurveyed public lands of the United States lawfully, and construct irrigating ditches, canals, or reservoirs whose main purpose is that of irrigation, filing his map or plat of the same twelve months after the survey of the lands by the government for the approval of the secretary of the interior, and that the grant becomes fixed so far as the right of way is concerned upon the construction of the ditch or canal, the approval of the secretary afterwards being in the nature of a confirmation of the grant and a completion of the title thereof upon the records kept by the government.

But it is contended by the plaintiff in error that the Act of February 15, 1901, modifies the former act so that no right of way can be acquired upon the public lands of the United States, surveyed or unsurveyed, without first obtaining permission from the secretary of the interior. The Act of 1901, however, has received no such construction from the department of the interior. In fact, the honorable secretary in section 47 of the circular of regulations, draws the distinction between the two acts in the following apt language: "It is to be especially noted that this act (1901) does not make a grant in the nature of an easement, but authorizes a mere permission in the nature of a license, revokable at any time, and it gives no right whatever to take from the public lands, reservations, or parks adjacent to the right of way any material, earth, or stone for construction or other purposes." Section 46 of these regulations of the interior department of 1905, in construing the Act of February 15, 1901, and providing regulations in pursuance of that act, provides: "Although this act does not expressly repeal any provision of law relating to the granting of permission to use rights of way contained in the act referred to, yet, considering the general scope and

survey of the exterior lines of the reservation does not remove the objection. In re Coeur d'Alene Railway & Navigation Co., 16 Land Dec. 66 (1893).

The right of way for a ditch that traverses military and Indian reservations will not be approved for any part thereof where by its maintenance the supply of water necessary for the proper use of the reservation will be impaired. In re La Plata Irrigation Ditch Co., 21 Land Dec. 355 (1895).

The Act of March 3, 1891, does not authorize the application for a canal across an Indian reservation, nor will such right of way below such reservation be granted if the canal is dependent for its water supply upon the right of

purpose of the act, and congress having, with the exception above noted, embodied therein the main features of the former acts relative to the granting of a mere permission or license for such use, it is evident that for purposes of administration the latter act should control in so far as the same pertains to the granting of permission to use rights of way for the purposes therein specified. Accordingly, all applications for permission to use rights of way for the purposes specified in this act must be submitted thereunder. Where, however, it is sought to acquire a right of way for the main purpose of irrigation as contemplated by sections 18 and 21 of the Act of March 3, 1891, and section 2 of the Act of May 11, 1898, *supra,* the application must be submitted in accordance with the regulations issued under said acts." It is clear that the honorable secretary of the interior did not take the view that the Act of February 15, 1901, repealed or modified the Act of March 3, 1891, and section 2, Act May 11, 1898, c. 292, 30 Stat. 404 (U. S. Comp. St. 1901, p. 1575), the latter act being amendatory of the Act of March 3, 1891, making it plain that the Act of March 3, 1891, still applied to cases where the main purpose of the construction of ditches or canals was for irrigation and not to cases arising under the Act of February 15, 1901, which applied to parks, forest, and other reservations and for the construction of electric plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, as well as for canals, ditches, pipes, and pipe lines, flumes, tunnels, and other water conduits and for water plants, dams, and reservoirs to promote irrigation, for it is very evident that the main purpose of the Act of February 15, 1901, was not to grant rights of way for canals, ditches, and reservoirs for irrigation purposes mainly, but for many other purposes as well. It is quite significant that the secretary in his regulations issued in 1905, construing the Act of 1901, should use the language above quoted, indicating that the Acts of 1891 and 1898 were still in force, where, in the construction of such canals, ditches, and reservoirs, the main purpose of which was, as in the present case, irrigation.

way asked through the reservation. In re Rio Verde Canal Co., 26 Land Dec. 381 (1898).

The provisions of section 18, Act March 3, 1891, granting rights of way "through the public lands and reservations of the United States" for irrigation purposes, include Indian reservations, subject to the conditions that the location and construction of the ditch or canal shall not interfere with the proper occupation of such reservations by the government for Indian purposes and uses. In re Rio Verde Canal Co., 27 Land Dec. 421 (1898).

C. National Parks.

The Act of March 3, 1891, does not public lands for irrigation purposes is applicable to the Sequoia National Park

The term "public lands," as used in the Act of 1901, seems to be used in a different sense than the same term is used in the Act of 1891, in this, that the act while using the term "public land" applies it to lands subject to use for parks, reservations, and other purposes by act of the United States necessitating the granting of a permit or license only for right of way purposes, whereas under the former act an easement attaches which by the approval and confirmation of the secretary of the interior after survey may become permanent, as in the case of a railroad right of way, provided that the right of way appropriated upon unsurveyed lands by the construction of canals, ditches, or reservoirs has for its main purpose the irrigation of lands, as provided for in the Act of 1891, as amended by the Act of 1898. Lands covered by parks, reservations, etc., are still lands of the United States, but are not public lands in the same sense as when free from the limitations of such incumbrances. Thus it will be seen that there is no conflict between those laws. Both of them may stand, and being construed together, each may serve the purpose intended by congress, depending upon the conditions existing at the time. It has long been the policy of the government to encourage irrigation in the arid and semi arid west. Congress in its wisdom has enacted such laws as will enable rights of way to be acquired for such irrigation works over the public lands, and thus encourages the development of the country. The tendency has been towards more liberal laws in that regard, and it is a matter of common knowledge that in this territory it has been the custom for years to enter on the unsurveyed public lands of the United States and construct such ditches, canals, pipe lines, and reservoirs as were necessary to put the waters of the streams to a beneficial use for agricultural and kindred purposes. Now it is apparent, as regards the construction of ditches and canals for irrigation purposes upon unsurveyed land, that if the approval of the secretary of the interior must be had before any such construction can be made, it would be tantamount to saying that no such ditches, canals, or reservoirs could be constructed upon unsurveyed public domain, for the reason that section 19 of the Act of Congress of 1891 provides that: "Any canal or ditch company desiring to secure the benefits of this act shall within twelve months after the location of ten miles of its canal,

Reservation, subject to the condition that if granted, it shall not interfere with the proper occupation of the reservation by the government. In re Grugeninger, 20 Land Dec. 253 (1895).

4. Reservoir Sites.

The provisions of the Act of March 3, 1891, conferring privileges for irrigation purposes over the public domain and reservations of the United States, do not contemplate the allowance of such rights over the land reserved by the government for reservoir sites. In re Blue Water Land & Irrigation Co., 23 Land Dec. 275 (1896).

if the same be upon surveyed land, and if upon unsurveyed land within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located, a map of its canal, ditch or reservoir, and upon approval thereof by the secretary of the interior the same shall be noted upon the plats of said office," etc., showing that corporations, associations, or persons may lawfully enter upon unsurveyed public land and obtain a right of way for the construction of ditches, canals, etc., whose main purpose is for irrigation, and maintaining the same until twelve months after the survey of the lands by the United States, at which time maps, plats, etc., must be filed in compliance with the act of congress. However, years might elapse before such surveys were made by the United States. The regulations of the secretary of the interior above referred to provide for the filing of maps, plats, etc., within twelve months after the location of ten miles of a canal, provided the same be upon surveyed lands, but, as to unsurveyed lands, we find provisions indicating that the filing of such maps, plats, etc., and the approval of the secretary of the interior of such right of way, is wholly unnecessary, and, in fact, such approval could not be made by the secretary. "Maps showing canals, ditches, or reservoirs wholly upon unsurveyed lands, may be received and placed on file in the general land office and the local land office of the district in which the same is located, for general information; and the date of filing will be noted thereon, but the same will not be submitted to nor approved by the secretary of the interior, as the act makes no provision for the approval of any but maps showing the location in connection with the public surveys. The filing of such maps will not dispense with the filing of the maps after the survey of the lands and within the time limited in the act granting the right of way, which maps, if in all respects regular when filed, will receive the secretary's approval." In the regulation just quoted the secretary of the interior distinctly states that no such approval or permission as the law contemplates could be granted for a right of way for irrigation purposes while the land remains unsurveyed, and it does not seem reasonable with the law and regulations above referred to providing for such right of way for irrigation purposes that such approval and permission should be granted by the secretary of the interior as a condition precedent to the construction of

IV. Maps and Approval.

A. Time of Filing.

Irrigation ditches, canals, etc., may be constructed upon the unsurveyed public lands of the United States, and maps and plats thereof are not required to be filed until twelve months after the survey is made. United States v. Lee, principal case.

The provisions of the Act of March 3, 1891, requiring map of location to be filed within twelve months after the location of the canal, ditch or reservoir, if upon surveyed lands, and within twelve months after the survey if upon

irrigation enterprises upon unsurveyed lands, when the granting of such approval was impossible under the law. If such view is to obtain, an irrigation system could not be established, even upon surveyed lands in the event that the line of ditch or canal traversed any portion of the unsurveyed public domain.

It would appear as a serious step backwards to now hold that such irrigation systems could not be constructed and rights of way acquired upon unsurveyed land without first seeking the consent of the secretary of the interior, thus involving long and tedious delays, which in such case would be absolutely unavoidable under the law. This consent would, of course, be necessary in cases of parks and reservations where permanent rights cannot be acquired, but only a license granted by the government; but it was never intended to apply to the open, unsurveyed public land which will eventually be settled upon and improved.

The allegation of the complaint as to the intervening rights of settlers upon some of the public lands over which ditches are or may be constructed it is not necessary here to consider, for the reason that this action is brought by the United States and not by settlers who may or may not be injuriously affected by the construction of the canals and ditches involved in this litigation. Furthermore, there is a provision of law for the adjudication of the rights of settlers on the public lands of the United States when the same are injuriously affected by the construction of irrigation systems (section 19, Act Congress, above quoted), and in a proper case damages may be awarded, but such damages could not in any event be awarded in this proceeding. The sole question here is the right of the government to enjoin the defendants from going upon unsurveyed public lands and taking possession of them for the purpose of acquiring a right of way over the unsurveyed public lands of the United States for irrigation purposes, without first filing maps and obtaining the approval and permission of the secretary of the interior so to do. We are of the opinion that injunction will not lie against the defendants under these circumstances, as the lands involved are unsurveyed lands of the United States, as to which the secretary of the interior would be required by law to decline either to grant such right of way or to approve of the construction of such ditches, etc., if such maps were filed in his office.

unsurveyed lands, is directory and not mandatory with respect to the time of filing. In re Battlement Reservoir Co., 29 Land Dec. 112 (1899).

B. Necessity of Approval.

The approval of the secretary of the interior is not a prerequisite to the construction of irrigation ditches or canals upon the unsurveyed public lands which are not part of a national reservation. United States v. Lee, principal case.

C. Approval in Part.

An application for right of way for canal purposes may be approved in so

There being no error in the rendition of the decree of dismissal in the court below, the decree is affirmed with costs. It is so ordered.

POPE, C. J., and PARKER, J., concur. POPE, C. J., and PARKER, McFIE, and ABBOTT, JJ., are the only members of the court as now constituted who heard this case.

ABBOTT, J. (dissenting). By the statute of February 15, 1901 (6 Fed. St. Ann. 513), congress must, in my opinion, have intended to provide a complete system of governing the acquisition of rights of way over the public domain for the several purposes specified in the Act, and to supersede the system established by Act of Congress of March 3, 1891 (6 Fed. St. Ann., pp. 508, 509, 510), relating to irrigation only, under which the defendant claims. The earlier act provides: "That the right of way through the public lands and reservations of the United States, is hereby granted to any canal or ditch company, formed for the purpose of irrigation, and duly organized under the laws of any state or territory, * * * to the extent of the ground occupied by the water of the reservoir and of the canal, and its laterals and fifty feet on each side of the marginal limits thereof, also the right to take from the public lands adjacent to the line of the canal or ditch material, earth, and stone necessary for the construction of such canal or ditch." The right thus obtained was a permanent easement, a property right in a strip of the public domain, of the width named and of indefinite length, with the right to take materials outside of it, all without obtaining the permission of any officer of the United States, or making any payment to the United States. The later statute allows the granting of revocable licenses only by the secretary of the interior permitting the use of rights of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant National Parks, not only for "canals, ditches, pipes and pipe lines, flumes, tunnels or other water conduits, and for water plants, dams, and reservoirs, used to promote irrigation," but for the various other uses which had come into being or assumed prominence since the Statute of 1891 was enacted, some of which had been recognized by intervening enactments of congress.

far as it affects public lands, though the greater part of the land it traverses does not belong to the public domain. In re Kern Valley Water Co., 15 Land Dec. 577 (1892).

Where the right of way sought is over surveyed and unsurveyed lands it may be approved for that portion upon surveyed lands if it can be used independently of the other portions. In re Cache Valley Canal Co., 16 Land Dec. 192 (1893).

V. Effect of Grant of Land.

Permission to use the public lands

The consent of the secretary of the interior is a prerequisite to the acquisition of rights under it, and to him is given the power to revoke such a license in his discretion. That provision in my opinion registers the change which had taken place in the public attitude in the ten years which had elapsed since the enactment of the earlier statute on the question of conserving the natural resources of the country for the public, instead of allowing them to be appropriated at will for private gain. It seems a thing incredible that congress so late as 1901, in making a law covering the subject, should have intended to leave the public lands of the United States open to the acquisition of permanent easements of such extent and probable value as those obtainable under the earlier statute, without the payment of a dollar to the United States, and without the consent, even against the objection of its officers.

The canons of statutory construction do not require us to adopt a view so contrary to the well-known policy of the United States Government, but instead, as it seems to me, to hold that the later statute, in the language of Judge Shipman, in Kent v. United States, adopted by Mr. Chief Justice Fuller, in United States v. Ranlett & Stone, 172 U. S. 133, 19 Sup. Ct. 114, 43 L. Ed. 393, "is complete revision of the subject to which the earlier statute related, and the new legislation is manifestly intended as a substitute for the former legislation, and the prior act must be held to have been repealed." The fact that between 1891 and 1901, namely, in 1895 (Act Jan. 21, 1895, c. 37, 28 Stat. 635; 6 Fed. St. Ann. 510 [U. S. Comp. St. 1901, p. 1572]), 1896 (Act May 21, 1896, c. 212, 29 Stat. 127; 6 Fed. St. Ann. 510, 511 [U. S. Comp. St. 1901, p. 1573]), and 1898 (Act May 11, 1898, c. 292, 30 Stat. 404; 6 Fed. St. Ann. 512 [U. S. Comp. St. 1901, p. 1575]), statutes were enacted partially covering some of the subjects grouped in the Statute of 1901, including an amendment of the Statute of 1891, under consideration, is to my mind an additional reason for holding that the Statute of 1901 was meant to take the place of all those earlier statutes. See Sutherland, Stat. Con. (2d Ed.), pp. 461, 463, 472, 473; United States v. Tynen, 11 Wall. 88, 20 L. Ed. 153; United States v. Ranlett, 172 U. S. 133-140, 19 Sup. Ct. 114, 43 L. Ed. 393; United States v. Claflin, 97 U. S. 546, 24 L. Ed. 1082; Com. v. Mann, 168 Pa. 290, 31 Atl. 1003; Roche v. Jersey City, 40 N. J. Law 257; Ex parte Joffee, 46 Mo. App. 360-365.

under the Act of January 21, 1895, terminates with the disposal of the land, and any person receiving title from the United States to lands so occupied takes it free from any charge thereon by reason of the right granted by that act. Instructions of Secretary of Interior, 20 Land Dec. 164 (1895).

As to rights acquired by appropriator who does not comply with statutes providing for the posting and recording of notices, etc., see note to Duckworth v. Watsonville Water & Light Co., *ante*, p. 129.

MORGAN v. MYERS.

[Supreme Court of California, January 7, 1911; rehearing denied February 16, 1911.]

— Cal. —, 113 Pac. 153.

1. Assessment Work, Claims in Common.

When several claims are held in common, the assessment work necessary to keep them alive may be done on one claim if for the benefit and advantage of all.

2. Same—Claims Not Contiguous.

The fact that mining claims are not contiguous and that they are separated by a ravine goes to show that assessment work done on one is not for the benefit of the other.

3. Same—Group of Claims—Intention.

Upon the question of whether or not a number of claims constitute a group, the intention of the owner was held properly excluded.

4. Evidence—Conclusions.

The use of the words "to my own satisfaction" indicates a conclusion by the witness, and his testimony is properly exeluded.

5. Same—Objection without Stating Grounds.

An objection on the ground that the question is "improper and ought to be a different one" held properly overruled as too general.

6. Same—Admissions by Grantor.

Admissions by a prior holder in possession are competent to show the nature of the holdings of the grantee.

Department 2. Appeal from Superior Court, Riverside County; F. S. Densmore, Judge.

Action to quiet title by William Morgan against G. W. Myers. Judgment for defendant. Plaintiff appeals. Affirmed.

For appellant—Palmer & Mahan.

For respondent—John G. North.

MELVIN, J. Action to quiet title to certain mining claims in Riverside County. The answer disclaimed any interest of defendant in certain of the claims, naming them, but asserted defendant's ownership of two claims, the Red Rose and the Blue Jacket, and averred that these two claims contained within their boundaries part of the property within the limits of the Desert Quail and Comstock claims to which plaintiff

NOTE.

Failure to perform assessment work, | see note to Wright v. Killian, 21 Mor. Min. Rep. 211.

asserted ownership. There was also a cross-complaint, in which G. W. Myers' ownership and possession of the Blue Jacket and the Red Rose claims were pleaded. This cross-complaint contained the usual prayer that cross-complainant's title to the property in question be quieted. There was an answer to the cross-complaint controverting the essential allegations therein, and upon the issues thus formed the case was tried. The court found for the defendant and cross-complainant upon all the matters involved. This appeal is from the order denying plaintiff's motion for a new trial.

Plaintiff's claim to the property in question is based primarily upon locations made by James B. and William L. McHaney and asserted title thus acquired to certain claims, to wit, the Desert Queen, the Comstock, Chief of the Hills, Dry Lake Valley, Juniper, Desert Chief, and Desert Quail. Respondent depends upon locations of the two claims which he made after the Comstock and Desert Quail had, according to his contention, been abandoned. In other words, respondent's position is this: That the Red Rose and the Blue Jacket claims only encroach upon the Comstock and Desert Quail, and that when they do so, his title to the territory thus involved is good, because of plaintiff's previous abandonment of the older claims.

The first contention of appellant is that the evidence is insufficient to sustain the findings. In this we cannot agree with him. There was a sharp conflict in the testimony of surveyors and others who testified on behalf of the respective litigants, but it is not our function to reconcile this conflict if there is any evidence to support the findings. Mr. Loucks, a surveyor, testified to a measurement of the various claims involved in this discussion in accordance with the monuments indicted to him by one of the McHaney brothers, who were the original locators of the claims to which plaintiff asserted title. His map which was received in evidence thoroughly agreed with the defendant's assertions with reference to the territory involved, and the defendant and other witnesses corroborated him in several particulars. Evidently the court accepted this testimony as accurate and acted upon it. Respondent also introduced evidence tending to show that the Blue Jacket and Red Rose were located by him in 1906, and that he duly performed the necessary assessment work on these claims. There was also evidence tending to show that no work had been done upon the Comstock and the Desert Quail since 1904.

The principal point of controversy in the case is this: Plaintiff and appellant contends that all of the claims mentioned in his complaint are contiguous; that they constitute a group; and that consequently work done upon one or more of them should be counted as for the benefit of all. In support of this position it was shown that very extensive opera-

tions had long been in progress on the Desert Queen claim and some others. Respondent, on the other hand, asserts that appellant's claims are not contiguous, and that in any event the work done by appellant on the Desert Queen and the Chief of the Hills was not for the benefit of the claims involved in this controversy. Section 2324 of the Revised Statutes (U. S. Comp. St. 1901, p. 1426) contains the following provision: "On each claim located after the tenth day of May, 1872, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. * * * But where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location, * * * provided that the period within which the work required to be done annually on all unpatented mineral claims shall commence on the 1st day of January succeeding the date of location of such claim."

The rule with reference to the performance of work under the above-quoted section is well stated in Chambers v. Harrington, 111 U. S. 350, 4 Sup. Ct. 428, 28 L. Ed. 452: "When several claims are held in common, it is in the line of this policy to allow the necessary work to keep them all alive to be done on one of them. But, obviously, on this one the expenditure of money or labor must equal in value that which would be required on all the claims if they were separate or independent. It is equally clear that in such case the claims must be contiguous, so that each claim thus associated may in some way be benefited by the work done on one of them."

While it may be conceded that work done even outside of contiguous claims may be credited to all of the properties, if for the benefit of all, it is necessary that that work shall at least be probably advantageous to all parts of the group. Evidently the opinion of the court in this case was that the work on the Desert Queen and Chief of the Hills had no relation to the Comstock and the Desert Quail. There was evidence of the surveyor and others that appellant's claims were not contiguous in the sense of being attingent. Joseph Toutain testified to admissions on the part of the original locators that there was unclaimed and unoccupied ground between the Comstock and the Desert Queen. The fact that they were, according to some of the evidence, separated by a ravine perhaps had some effect in leading the court to the conclusion that work upon one would not naturally benefit or have a tendency to uncover the minerals

in the other. This deduction might also be reached from other testimony regarding the topography of that region.

Appellant lays great stress upon a notice of location, a purported copy of which was introduced in evidence. It is asserted that by this notice one of the original locators described the Desert Queen and the Comstock as being together and touching, but on the witness stand the writer of the original notice said, "It did not read that way." Whether the notice was sufficient to overthrow this testimony was a matter not for this court, but for the trial court. This disposes of the main point in the case. Our attention has been called, however, to certain alleged errors of law occurring at the trial.

Appellant while on the stand was asked to state whether or not these mines had been held by him as a group. Mr. North objected, upon the ground that a conclusion of the witness was called for, rather than a fact, and that the matter in issue was what work had been done there, what witness' holding or possession consisted of, and where the work was done. The court sustained this objection, and we think this ruling was correct. Whether or not the claims were held as a group was best evidenced, not by the intention of the witness, but by the location of the properties and the kind, quality, and place of the work performed. Mr. Halliday, a civil engineer, who testified on behalf of appellant, was asked the following question: "Is there any other point, or are there any other points, on the map that you are able to locate definitely from information that you received or from other points that you have, and tell what they are?" He began his answer as follows: "From the location notices and notice on the Victoria, a description of it, I was able to locate, to my own satisfaction, both the northwesterly and southwesterly corners of the Victoria and from that to determine * * *"—and at this point the objection was made that the witness should not state a conclusion from things he found on the ground. The court in sustaining his objection said: "That would substitute his judgment for that of the court." In view of the scope of the question, we think that the ruling was entirely correct. The use of the words "to my own satisfaction" by the witness indicates that he was testifying to his conclusion, rather than to any physical facts involved.

A. R. Fabun, a witness who testified on behalf of defendant, was asked whether from an examination of a map, introduced as one of defendant's exhibits, he could recognize the Desert Queen mining claim and the Comstock mining claim. To this the following objection was interposed: "I object to the question for the reason that he is asking him whether he recognizes certain mining claims, and I presume that the question ought to be a different one. I don't think that is proper." The

objection was overruled, and this was assigned as error by appellant. While the question was perhaps improper, the objection was not of a kind to call the court's attention particularly to the vice of the interrogatory. In fact, there was no ground stated in the objection. It amounted to nothing more than a suggestion to the court that the question ought to be a different one. In order to be available, the objection should have specified some ground for the court's action, and, as no such reason was advanced, there was no error in the ruling.

Appellant excepted to the action of the court in permitting witness Fabun to testify that at a time when James B. McHaney held title to the Comstock and the Desert Queen he admitted that there was unoccupied and unlocated ground between these two claims. We think such evidence was clearly relevant under section 1849, Code Civ. Proc., which is as follows: "Where, however, one derives title to real property from another, the declaration, act, or omission of the latter, while holding the title, in relation to the property, is evidence against the former." While it is true that the declaration of McHaney did not apply directly to his own property, it did apply to the limitations of his own claims and the matter of their contiguity. In that respect it was a declaration with reference to his properties.

We find no other alleged errors that require special attention.

From the foregoing discussion it follows that no material error appears, and therefore the order from which appeal is taken is sustained.

We concur: HENSHAW, J.; LORIGAN, J.

GLADYS CITY OIL, GAS & MANUFACTURING CO. et al. v. RIGHT OF WAY OIL CO. et al.

[Court of Civil Appeals of Texas, April 13, 1911; on motion for rehearing May 14, 1911.]

— Tex. —, 137 S. W. 171.

1. Deeds—Intention of Grantor.

The construction of a deed is governed by the intention of the grantor as gathered from the whole instrument.

2. Same—Knowledge and Acquiescence of Grantee.

The fact that a deed was procured by the attorney for a railroad company and was delivered and remained in its custody, shows conclusively that the deed was taken with its knowledge and procurement.

3. Same—Construction.

When a grantor first uses terms confined to a particular class and subjoins a term of general import, this term when thus used embraces only things *ejusdem generis.*

4. Same.

The rule that the language of a deed should be construed against the grantor should be reversed where the deed is prepared by the grantee.

5. Same.

The rule that the language of a deed should be construed against the grantor should not be applied until all other rules of construction fail.

6. Railroads—Right of Way—Right to Take Oil.

A deed conveying a right of way over a tract of land, together with the right to take and use all timber, earth, stone and mineral within the same, to have and to hold so long as used for a railway, does not convey the right to take oil and minerals from beneath the surface.

7. Same—Right of Way—Right to Take Oil.

The owner of the fee has no right to enter upon the right of way of a railroad company for the purpose of boring for oil.

8. Same—Meaning of "Right of Way."

The term "right of way" ordinarily means an easement; but the use of additional words may widen it into a fee.

9. Same—Right of Way—Estoppel.

Long continued acquiescence in the possession by a railway company of a right of way 200 feet wide held to estop the owner of the fee from denying the claimed width.

10. Estoppel—Claim of Ownership of Oil Rights.

Failure to enjoin or prevent the boring of a well on its right of way held not to show acquiescence in the claim of a railroad company to the oil underneath its right of way.

11. Appeals and Errors—Findings of Fact—Request Necessary.

Where the trial court files conclusions of fact, the mere omission of further findings cannot be availed of on appeal without a specific request for such findings.

NOTE.

Construction of oil and gas leases, see note to Bellevue Gas and Oil v. Pennell, *ante*, p. 396.

12. Same—Assignment of Error Uncontroverted.

Where an assignment of error is uncontroverted by the appellee's briefs or arguments, the court is authorized to accept the same as true.

13. Same—Estoppel against Error.

A party cannot complain of the action of the trial court complying with his own request.

14. Same—Excessive Damages—Objection Too Late.

Objection that the measure of damages for the conversion of oil is excessive in not allowing for the cost of extraction, held to come too late when presented for the first time in a petition for a rehearing.

Appeal from District Court, Jefferson County: W. H. Pope, Judge.

Action for possesion of an oil tract and its products by the Gladys City Oil, Gas & Manufacturing Company and others against the Right of Way Oil Company and others. Judgment for defendants. Plaintiffs appeal. Reversed and rendered.

For appellants—D. Edward Greer, Chenault O'Brien and Geo. Chilton.

For appellees—W. D. Gordon, Oswald S. Parker, Parker, Orgain & Butler, and Baker, Botts, Parker & Garwood.

REESE, J. This is an appeal from a judgment of the district court of Jefferson County, in favor of defendants, in a suit by the Gladys City Oil, Gas & Manufacturing Company and the J. M. Guffey Petroleum Company against the Right of Way Oil Company, the Texas & New Orleans Railway Company, the Gulf Pipe Line Company, and Oswald Parker, trustee.

We copy from appellants' brief the following statement of the issues as presented by the pleadings of the respective parties:

This is a suit for the possession of a tract of land, part of the John A. Veatch survey in Jefferson County, Tex., and for the title and possession of all oil produced therefrom, and for an injunction restraining the defendants from drilling oil wells on the land, and taking oil therefrom, and from asserting any right or claim thereto. The plaintiff alleged: That the Veatch survey was granted to John A. Veatch in 1835. That he died, leaving certain parties as his heirs (six in number), and that by mesne conveyance all of the title to that part of the survey embracing the land in controversy became vested in the plaintiff the Gladys City Oil, Gas & Manufacturing Company prior to September 18, 1900. That on that date the said company made a lease to the assignor of plaintiff the J. M. Guffey Petroleum Company, giving it exclusive right to take possession of the said land, drill oil wells thereon, and extract the oil therefrom, and that soon thereafter the said company did take possession of

the said land, drilled wells and found oil in great quantities, and has been ever since in possession of the said land, producing oil therefrom. That the oil underlying the land is situated at a depth of from 1,000 to 1,500 feet, and the only way the oil can be reached and extracted is by sinking wells to such a depth, casing up the holes with iron pipe and pumping the oil through such wells. That the producing of oil is a large and separate business, entirely distinct from any business in which a railroad ever engages. That the Texas & New Orleans Railway Company has a line of track which it operates running through the leased premises, and is the successor in interest to the East Texas Railway and the Sabine & East Texas Railway Company, the said railroad track having been built many years before the plaintiff acquired any interest in the land. That there was granted by some of the part owners to the Sabine & East Texas Railway Company a right of way over and across the said survey so far as such grantors had title, to wit: That S. H. Veatch, one of the six heirs of John A. Veatch, in July, 1881, made a deed purporting to grant a right of way across the said tract of land 200 feet in width, a copy of which instrument was attached to plaintiff's petition as "Exhibit A." That in February, 1891, Geo. W. O'Brien and Emma E. John made a right of way deed to the said railroad company over a strip of 100 feet in width, and about the same date W. C. Averill and P. S. Watts made a similar deed, copies of both of said instruments being attached as exhibits to the petition. At the time the last-mentioned deeds were made, O'Brien and John owned a half interest and Watts and Averill owned four-fifths of a half interest in the survey. That by reason of these deeds the said railroad company has acquired an easement in a right of way over the land, but no other interest and has no right to take any minerals except such solid minerals on the surface as may be suitable for the construction and maintenance of the railroad. About 1892 the Gladys City Oil, Gas & Manufacturing Company had this land surveyed out and platted, laying the same out in blocks approximately 300 feet square, leaving streets in such parts of this land as were included in Gladys City proper, and laying out the balance of the land in farm lots of from 10 to 40 acres each. That prior to this the railway company had taken possession of a strip 200 feet in width, or 100 feet distant from its track where the land in controversy is located, and that the said company, when it made the survey, respected the possession and claim of the railway that it had for the purposes of a right of way an easement to the strip lying southeast of the northwest corner of block 45 and made its survey and plat accordingly; that is, it left unsurveyed and unplatted the 200-foot strip, and laid off its blocks with the property line 150 feet from the center of the railway, thus leaving a street

between the strip claimed by the railway as a right of way and the property line, 50 feet in width. That the defendant Right of Way Oil Company, acting under a lease from the Texas & New Orleans Railway Company, and having no other title, just prior to the filing of this suit, had entered upon a part of the land embraced in the lease and on the right of way of the railway company, acquired as before stated, and drilled a well thereon that produced a considerable quantity of petroleum oil which had been delivered to the defendant Gulf Pipe Line Company, and sold to it, stating the amount of oil and the amount of money. The particular part of the right of way alleged to have been trespassed upon was described by field notes. The petition set out the exact location of the wells, and showed that, if the railroad company had a right of way of 200 feet in width, the well would be on the right of way; otherwise it would be off the same. The petition also showed that before the well was drilled the plaintiff Guffey Petroleum Company notified the Right of Way Oil Company that, if it drilled any well, it would do so at its peril; that the Guffey Petroleum Company claimed the land and the exclusive right to produce oil therefrom.

The prayer was for judgment establishing title in plaintiffs to the land described as the land trespassed upon by the defendants, and the exclusive right of the Guffey Company to drill on the said land and extract oil therefrom; and also establishing the title of the plaintiffs to the well and all oil produced therefrom; also, an injunction on final hearing restraining defendants from drilling any other wells on the land or setting up any claim thereto. All of the defendants answered jointly, first, by a general demurrer; second, by a plea of not guilty; third, by plea of the statute of limitation of three, five and ten years; and, fourth, specifically that, at the time the deed was executed by S. H. Veatch in 1881, he was claiming to own the whole survey in common tenancy with the other heirs of his father, John A. Veatch; that his undivided interest amounted to several hundred acres; that the said survey was all the same kind of land and all parts of it were at the time of equal value; that S. H. Veatch lived in Sabine County, Tex., and that all the other heirs lived in California, and at the time he was the general agent and representative of the other heirs, looking after their landed interests in Texas, and holding power of attorney from two of them; that he had acted as their agent in selling other lands, and they had always ratified what he did; that in making the deed he was acting for all of the heirs and each of them receiving the benefit of building the railroad and acquiesced in and ratified his act in making the deed to the railroad company.

It is further averred that Geo. W. O'Brien was the organizer and principal owner of the Gladys City Oil, Gas & Manufacturing Company; that

he was the attorney for the Veatch heirs in the litigation involving title to the said land; and that the said O'Brien and others acquired all the title from the said Veatch heirs, including S. H. Veatch, about 1891, and that this title passed to the plaintiffs; that at the time of the execution of the deeds by O'Brien and Averill to the railroad company O'Brien was the duly authorized attorney representing the Sabine & East Texas Railway Company in all of its legal matters in this section of Texas, and Averill was its vice president. The Gulf Pipe Line Company answered that the Right of Way Oil Company had run a stated quantity of oil into its lines from the land in controversy, and that it had bought the oil, paying the Right of Way Oil Company therefor, but had taken a bond with the Fidelity & Deposit Company of Maryland as security to indemnify it against loss or damage in case the Right of Way Oil Company had no title. It asked for judgment over against the Right of Way Oil Company for the amount of money it had paid the said company in case the plaintiffs recover judgment against it.

The plaintiffs filed a first supplemental petition in answer to the answer of the defendants, containing: First. Special exceptions to that part of the answer claiming an estoppel. Second. Setting up that the defendants were themselves estopped from claiming that the railway company owned more than 100 feet in width across the survey by reason of the fact that, after taking the deed from S. H. Veatch in 1881 for a right of way 200 feet in width, the railroad company in 1891 procured and accepted deeds from Watts and Averill and O'Brien and John for a right of way only 100 feet in width; that they were further estopped from claiming that they owned the entirety of the minerals under the right of way because in the deeds taken in 1891 from Watts and Averill and O'Brien and John no right to use any minerals except earth and stone was granted. This we supplement as follows: Defendants pleaded, with full statement of the facts upon which they based such defense, estoppel and acquiescence on the part of plaintiff in the right and ownership of defendants in a right of way 200 feet wide across the Veatch survey, with the right to take the oil from the land. They also attached as an exhibit to their answer a copy of the deed from S. H. Veatch to the East Texas Railway Company, under whom defendants claim, and which is hereafter fully set out. Plaintiffs in their petition prayed the court "to hear evidence and determine the extent of the right of way owned by the Texas & New Orleans Railway Company across the Veatch survey; that is, the width and extent thereof, and that as to such right of way the railway company has no right to drill wells and take oil below the surface."

A jury was waived and trial was had before the court, and resulted in a judgment that the plaintiffs take nothing by their suit and that the

defendants, including the Gulf Pipe Line Company, "go hence without day"; that the pipe Line Company take nothing by its cross-bill; that the defendants be quieted in their title and right of possession to a strip of land 200 feet in width across the entire Veatch survey, and that the plaintiffs had no title or interest in any minerals underlying said land or extracted therefrom. From the judgment the plaintiffs prosecute this appeal. The trial court prepared and filed conclusions of fact and law, which are incorporated in the record.

We adopt the following conclusions of fact of the trial court, which are not objected to, nor attacked by appellant, or the objections to which we do not consider well taken:

"(1) All parties to this suit claim title through and under the heirs of John A. Veatch, the original grantee.

"(2) On the 29th day of July, 1881, S. H. Veatch, one of the six heirs of the original grantee, owning an undivided one-sixth interest in over 3,000 acres of the Veatch survey, made the deed set out in full in the plaintiffs' petition as an exhibit, and which is here copied in full: 'State of Texas, Sabine County, Know all men by these presents, that I, being the owner in fee of the following described tract of land lying in Jefferson County, Texas, to wit, an equal undivided one-third of a tract of land containing 19,481,003 square varas, originally granted and titled by the government of Mexico to John A. Veatch, as a colonist of Zavalla's colony, near a place called Sour Springs in said county, and lying between the J. W. Bullock and Pelham Humpries leagues surveys, except 177 acres in the N. W. corner of said Veatch survey, heretofore conveyed by my father, John A. Veatch, for the consideration of one dollar to me in hand paid and the further consideration of the benefits and advantages that will accrue to me by the construction of a railway over said tract of land, have and do hereby sell, grant and convey unto the East Texas Railway Company, for the purpose of constructing, operating and maintaining its railroad, the right of way 200 feet in width over and upon the above described tract of land, together with the right to take and use all the timber, earth, stone and mineral existing or that may be found within the right of way hereby granted, to have and to hold to said East Texas Railway Company and its successors, so long as the same or any part thereof may be occupied and used for the purpose of constructing, operating or maintaining its said railway. In witness whereof I hereby sign my name the 29th day of July, 1881.' This deed was duly acknowledged and recorded in Jefferson County August 19, 1881. The grantee in that deed, the East Texas Railway Company, was succeeded in due form by the present defendant Texas & New Orleans Railroad Company, and the

Right of Way Oil Company holds a lease giving it the right to develop the oil rights on said right of way under the said railway company.

"(3) At the time S. H. Veatch made the deed in question, he was the only one of the heirs living in Texas, and was the duly constituted agent and representative under written power of attorney of his sister, Fannie Veatch, and of his brother J. J. Veatch, and was the informal representative looking generally after the Veatch heirs' landed interests in Texas of the other Veatch heirs, all of whom lived in California. He was also the administrator of the estate of John A. Veatch, deceased, appointed and acting by and under the authority of Sabine County Probate Court of Sabine County, Tex., although there is no evidence that he was acting in any official capacity in making the deed in question.

"(4) At the time he made said deed conveying to the East Texas Railway Company the 200 foot right of way through the Veatch survey, he himself owned many times that amount in acreage in his own right and the land conveyed to and used by the railway company was average in value per acre with the balance of the survey, all of which was open, practically level, prairie land. * * *

"(6) At the time of and previous to the procurement of the said Veatch deed, Capt. Geo. W. O'Brien was the attorney for Kountze Bros., the promoters of the original railway company, regarding said matter, and continued up to the year of 1900 to represent said railway company as local attorney at Beaumont. Capt. O'Brien died about May, 1909.

"(7) At the time said deed was made by S. H. Veatch the land in controversy—that is, what is known as Spindle Top—was generally known and regarded as prospective oil land. It had been so known for many years prior to that time, and had been the subject of much speculation and conversation as prospective oil and mineral land, there being on the land and near where said railway company line is located mineral springs, surface indications, such as the bubbling of natural gas, etc., indicative of what was then regarded as oil deposits. There was no timber or stone on the surface. * * *

"(9) Soon after said right of way deed was obtained from S. H. Veatch, the said S. H. Veatch entered into a contract with Geo. W. O'Brien and A. S. John, under the firm name of O'Brien & John, purporting to act for himself and the other Veatch heirs, for the recovery by them as attorneys of said land from certain other adversary claimants, and for the clearing up of the Veatch title to said land, agreeing to give them one-half for their services.

"(10) A suit was instituted and judgment was obtained for said land, except 500 acres in the southeast portion of the survey, not adjacant to said railway, which was conceded to adversary claimants in compromise.

Therefore the other Veatch heirs who had not formerly empowered by writing S. H. Veatch to make said contract with O'Brien & John recognized and adopted the same as binding upon them, and about the year 1891 all the title remaining in said heirs after the conveyance to the said O'Brien & John of the said one-half interest was conveyed by their deeds to the said O'Brien and then widow of A. S. John, W. C. Averill, P. S. Watts, and J. F. Lanier, the last three named having purchased from some of the heirs, and the former having purchased from the remainder.

"(11) About the year 1892 the plaintiff Gladys City Oil, Gas & Manufacturing Company was organized for the purpose of exploiting said land for oil and gas; the moving spirit and principal owner thereof being the said Capt. O'Brien, who remained the president of the company from its organization until his death.

"(12) Soon after its organization, a portion of said survey on either side of said railway right of way was subdivided into lots and blocks in the form of a town site, called the Gladys City Subdivision of said survey. In surveying out and platting said town site and subdivision the said Gladys City Oil, Gas & Manufacturing Company respected the said railway company's right of way 200 feet wide and indicated the same on its map and plat and map of said subdivision, and recognized the appropriation of 200 feet claimed by the railway company through and under said Veatch deed.

"(13) There was never any other division or partition of said survey between said oil and gas company and said railway company except the actual appropriation by the railway company of said 200-foot strip and acts in ratification thereof by the said oil and gas company, which never at any time questioned the right of the said railway company to said right of way.

"(14) After repeated efforts to find oil on said land, said Gladys City Oil, Gas & Manufacturing Company finally in 1900 gave a lease to A. F. Lucas to all of said survey owned by it, giving him the exclusive right, on a royalty basis, to exploit said land, develop it for oil for a period of 20 years. Lucas brought in an oil well which proved a portion of said land as oil bearing in the year 1901. He then assigned his rights to the present plaintiff, J. M. Guffey Petroleum Company, and the section of said land lying east of said railway right of way has been since then developed as an oil field. * * *

"(17) The Right of Way Oil Company, holding a lease from the Texas & New Orleans Railway Company, through Oswald S. Parker, trustee, its immediate lessor, about November, 1909, drilled a well on said right of way as alleged in the plaintiff's petition, obtained oil and equipped the same and has since operated it under pump, producing a production

up to the time of the trial of this cause of 7,569.54 barrels of oil of the value of 80 cents per barrel, which oil it has run to the Gulf Pipe Line Company and sold to it at 80 cents per barrel. The proceeds thereof have been paid over to the Right of Way Oil Company by the said pipe line company upon the giving of an indemnity bond against this suit.

"(18) The J. M. Guffey Petroleum Company served written notices by registered mail on the officers of the Right of Way Oil Company as soon as said well was started to be drilled, that they claimed the oil and mineral rights on said right of way and protested against the action of the Right of Way Oil Company in drilling said well, but the protest was not heeded by the Right of Way Oil Company."

In addition to these conclusions of the trial court, which we have adopted, we find the following:

The plaintiff Gladys City Company held under deeds from heirs of John A. Veatch the title to all of the land of the Veatch survey, except certain portions not necessary to refer to, and except whatever interest the railroad company acquired under the right of way deeds of S. H. Veatch and others referred to. The railway company has claimed since building its road, and used the same for railway purposes, a right of way 200 feet wide through that part of the land laid off as Gladys City, which includes that part of its right of way on which the well in question is located, and this claim has been acquiesced in by plaintiffs. It does not appear that it has claimed more than 100 feet right of way over that portion of the survey lying north of the Gladys City tract. The right of way is marked by T-rails set in the ground at intervals. These rails along the line of the right of way through Gladys City tract are placed 100 feet from the center of the track, and north of this tract 50 feet from the center of the track, on each side of the railroad. When the Gladys City Company acquired title, it laid off that part known as Gladys City into lots, blocks, and streets, respecting the railroad's claim to a right of way 200 feet wide, but that part of the land lying north of the Gladys City tract was laid off into farm lots, the lines of which were laid off to within 50 feet of the center of the railroad track, leaving a right of way 100 feet in width. This right of way has been continuously since used by the railroad company as and for railway purposes, the present line being a part of a trunk line from Sabine to Dallas, but such use has been only such as is made of a right of way easement by railroad companies.

On February 4, 1891, Geo. W. O'Brien and Emma E. John, who owned one-half of the Veatch survey, executed to the Sabine & East Texas Railway Company a deed to a right of way "equal to their interest" in a strip of land 100 feet wide over the said survey, and on February 6th W. C. Averill and P. S. Watts, who owned four-fifths of one-half interest,

executed a similar deed to a right of way to their interest in a strip of 100 feet wide. These deeds were duly recorded, and delivered to the railroad company, and the evidence is sufficient to authorize the conclusion that their execution was procured by the company. Oil under the land is found at a depth of from 800 to 1,000 feet, and it costs $4,000 to $4,500 to drill and equip a well similar to that of the Right of Way Oil Company. At the time S. H. Veatch executed the deed referred to he owned an undivided one-sixth interest in the Veatch survey of about 3,000 acres, and the land, at the time, was all of about the same market value. There has never been a partition of the land among the heirs, the interest of each having been acquired by the predecessors in title of the Gladys City Company by which they are now owned.

By the first assignment of error appellants assail the following conclusion of law of the trial court: "The deed of S. H. Veatch, made in 1881, conveyed to the grantee therein, the East Texas Railway Company, a right of way through said Veatch survey of land 200 feet in width, together with the right of the railway company to take and use all the minerals contained within, or that might be discovered upon said right of way. I construe the deed as conveying the same right to the railway company, both as to the surface and to the minerals beneath the surface, as any ordinary absolute fee-simple conveyance could convey such rights."

Under this assignment, appellants state the following proposition: "Where the grantor in a deed, in consideration of the benefits to accrue to him by the building and operating of a railway across his land, conveys a right of way to a railway company 'for the purpose of operating and maintaining its railroad,' and such deed contains this provision, 'Together with the right to take and use all the timber, earth, stone and mineral existing, or that may be found within the right of way hereby granted,' and has *habendum* clause as follows: 'To have and to hold, so long as the same, or any part thereof, may be occupied for the purpose of constructing, operating or maintaining its railway'—such deed conveys only a right of way or easement over the land, and passes the right to use such surface minerals only as would be useful in constructing and maintaining the railway, and does not confer any right on the railway to mine for oil or minerals under the surface, and especially would such deed not pass any right to fluid minerals, such as oil or gas, which could not be used in constructing and maintaining a railway." We copy this proposition in full because it substantially embodies our conclusions as to the law of the case, and practically disposes of the questions involved in this appeal.

Upon the issue thus presented the entire case turns, and the parties have presented their respective contentions as to the construction of the

deed of S. H. Veatch to the East Texas Railway Company, set out in the findings of fact, with great ability and with exhaustive citations of authority in support thereof. Both parties insist that the deed is unambiguous, and that there is no necessity to resort to parol evidence to explain its meaning, which is to be gathered from the terms of the deed itself, but this is about the only proposition upon which they agree, and upon this proposition the trial court agreed with them, giving to the deed the construction contended for by appellees; that is, that the deed conveyed what was in substance and effect the fee, determinable upon the happening of the contingency set out in the *habendum* clause, that is, when the land should cease to be "occupied and used for the purpose of constructing, operating and maintaining the said railway." If, in fact, the words, "together with the right to take and use all timber, earthstone and mineral existing, or that may be found within the right of way hereby granted," be construed to carry with it the right to take and use all minerals, whether on or under the surface, then indeed nothing of substantial right is omitted that would be included in a general conveyance, not of a right of way only, but of a strip of land 200 feet wide across the land referred to.

The right to take and use all minerals, if it includes subsurface minerals, would include not only the right to take and use petroleum oil, but everything else coming under the definition of "minerals upon or under the surface"; that is, "any constituent of the earth's crust." Century Dictionary, title "Mineral." See, also, 5 Words & Phrases, title "Mineral." Full ownership of and title to the land could carry with it nothing more of substantial right. So, if the terms used in the deed giving the right to use all minerals are to be taken in this broad sense, the title conveyed was in substantial effect a base or determinable fee as contended by appellees. The question presented then is as to the construction to be given to the deed with special reference to the language used giving this right.

It is a cardinal rule that deeds must be so construed as to effectuate, if possible, the intention of the grantor. This intention is to be gathered from the entire instrument. If the expressed meaning is plain upon the face of the instrument, it will control. Effect and meaning must be given to every part of the deed; each clause being considered separately and being governed by the intent deducible from the entire instrument, and separate parts being viewed in the light of other parts. The intent must be primarily gathered from a fair consideration of the entire instrument and the language employed therein, and should be consistent with the terms of the deed, including its scope and subject-matter. 13 Cyc. 601 *et seq.;* Hancock v. Butler, 21 Tex. 804; Simonton

v. White, 93 Tex. 56, 53 S. W. 339, 77 Am. St. Rep. 824; Armstrong v. Lake Champlain Granite Co., 147 N. Y. 495, 42 N. E. 186, 49 Am. St. Rep. 683.

We think it would be indisputably clear that the grant in the deed "to the East Texas Railway Company, for the purpose of constructing, operating and maintaining its railroad, the right of way two hundred feet in width over and upon the above described tract of land," conveyed no more than a right of way—that is, an easement of the extent named—unless the additional words, "together with the right to take and use all the timber, earth, stone and mineral existing or to be found within the the right of way hereby granted," express an intention to convey the land itself. Indeed, the grantor seems to be careful in the language used to express nothing more than an intention to convey a right of way or easement. The language used is "the right of way over and upon" the land, and the purpose is stated to be "the constructing, operating and maintaining its railroad." It is hardly conceivable that, if the grantor had intended to convey rights so extensive as are claimed by appellees under this deed, he would have used this language, in the granting part of the deed, and sought to accomplish such purpose by merely adding to this language "together with the right to take and use all the timber, earth, stone, and mineral," etc. It is to be further noted that the purpose of the grant, according to a proper construction of the language of the deed—that is, to construct, operate, and maintain its railroad—applies to, and limits also, this right to take and use, as well as the grant of the right of way. The right of way and the right to take and use, etc., are both "sold, granted and conveyed" for the express purpose stated of constructing, operating, and maintaining its railroad. It is altogether unreasonable to suppose that it was intended to grant anything more than a mere right of way "over and upon" the land, together with the right to take and use such timber, earth, stone, and mineral of whatever character there might be found to exist upon the surface. The right of way conveyed is certainly limited by its terms to the surface, and the right to take and use the substances named is limited to those found "within the right of way." If both parties had known that petroleum oil, which is in fact a mineral, underlay the land, if they could have, in 1881, seen so far into the future as to foresee that such oil would one day be used as fuel for locomotive engines, it is hardly conceivable that they would have used the language used in this deed to express an intention to grant to the railroad company the right to bore a well and take from 1,000 feet below the surface the oil which lay there. Such construction would also carry with it the right to take coal or iron or copper or any other substance coming within the meaning of minerals, and which might in any

way be used in the construction of a railroad or the equipment and operation of its trains. If it had been intended to grant such rights, why say anything about "a right of way over and upon" the land. The right to explore for and take from below the surface oil, coal, iron, and such other minerals as might be there found at great depth, provided only they might be used for the purposes referred to, is utterly inconsistent with the substantial purpose of the grant, as expressed in the deed.

We think it is also of much significance in construing this deed that the grant is made to take and use "all timber, earth and stone" in connection with minerals. These substances are found upon the surface. Earth and stone are likewise minerals, and, by adding "all minerals," it is reasonable to suppose that it was intended to go no further than to grant the right to take such other minerals as possessed this same general characteristic of surface mineral, such as might be used in construction of the railroad in the same way. This is the familiar doctrine of *ejusdem generis;* that is, that when a grantor in a deed or will makes use, first, of terms each evidently confined and limited to a particular class of a known species of things, and then, after such specific enumeration, subjoins a term of very extensive signification, this term, however general and comprehensive in its possible import, when thus used embraces only things *"ejusdem generis"*—that is, of the same kind or species with those comprehended by the preceding limited and confined terms. 3 Words & Phrases, title "Ejusdem Generis," p. 2328; Ex Parte Leland, 1 Nott & McC. (S. C.) 462; Spalding v. People, 172 Ill. 49, 49 N. E. 996; Bills v. Putnam, 64 N. H. 561, 15 Atl. 138; Benton v. Benton, 63 N. H. 295, 56 Am. Rep. 512; Misch v. Russell, 136 Ill. 25, 26 N. E. 528, 12 L. R. A. 125.

"The words 'right of way,' if not defined, are expressive of the very nature of the right ordinarily held by railway companies in the lands over which their roads run—a right to use the land only for railway purposes—an easement." Calcasieu Lumber Co. v. Harris, 77 Tex. 23, 13 S. W. 453. "It is true that the terms have a twofold signification. It sometimes is used to mean the mere intangible right to cross; a right of crossing; a right of way. It is often used to otherwise indicate that strip which the railroad company appropriates for its use, and upon which it builds its track." Keener v. Union Pac. Ry. Co. (C. C.), 31 Fed. 128; Joy v. St. Louis, 138 U. S. 1, 11 Sup. Ct. 243, 34 L. Ed. 843. The use of the term "right of way" will not limit the conveyance to a mere easement, if the other parts of the conveyance are sufficient, and indicate an intention, to convey a greater estate, but in such case will be considered as descriptive of the land conveyed. Nor will a clearly expressed purpose to convey the fee be limited by words expressing the purpose for which

the conveyance is made. We are of the opinion, however, that there is nothing in the language of the Veatch deed to extend the meaning of the words "right of way" beyond their ordinary signification. On the contrary, such language rather emphasizes the intention to use those words to accomplish the purpose for which they are ordinarily used, to convey only an easement. The provisions about the right to take minerals cannot be taken to extend the meaning of the words "right of way over and upon the land," but these latter words, it seems clear to us, must be construed as limited by the terms of the conveyance of "the right of way over and upon the land." 7 Words & Phrases, title "Right of Way."

We are of the opinion that there is in this deed no room for the operation of the rule that the language of a deed must be construed most strongly against the grantor. In the first place, it was shown that the deed was drawn according to a printed form prepared by the grantee, and, as thus prepared, was presented to and signed by the grantor. It is in the language not of the grantor, but of the grantee. In such case the rule should be reversed and the deed construed most strongly against the grantee, who prepared it and selected the language used. Uhl v. Ohio Ry. Co., 51 W. Va. 106, 41 S. E. 340; Lockwood v. Railway Co., 103 Fed. 243, 43 C. C. A. 202. In the second place, this rule is subservient to the ascertained intention of the parties, and is not to be applied or invoked until all other rules of construction fail. 13 Cyc., pp. 609, 610. The rule cannot be of any benefit to appellees in the construction of this deed. Our conclusion is that the deed conveyed only a right of way or easement "over and upon" the land, and that the right to take and use mineral which existed or might be found within the right of way did not include the right to sink wells and take the oil under the same. That the grant of a right of way merely did not carry this right is we think too well established to be questioned. District of Columbia v. Robinson, 180 U. S. 92, 21 Sup. Ct. 283, 45 L. Ed. 440; Lyon v. McDonald, 78 Tex. 71, 14 S. W. 261, 9 L. R. A. 295; O'Neal v. City of Sherman, 77 Tex. 182, 14 S. W. 31, 19 Am. St. Rep. 743; Calcasieu Lumber Company v. Harris, 77 Tex. 22, 13 S. W. 453; Muhle v. Railway Co., 86 Tex. 459, 25 S. W. 607; Couch v. Railway Co., 99 Tex. 468, 90 S. W. 860; Clutter v. Davis, 25 Tex. Civ. App. 532, 62 S. W. 1107; Uhl v. Railway Co., 51 W. Va. 106, 41 S. E. 341; Lockwood v. Railway Co., 103 Fed. 243, 43 C. C. A. 202; Vermilyea v. Railroad Co., 66 Iowa 606, 24 N. W. 234, 55 Am. Rep. 279; Railroad Co. v. Karthaus, 150 Ala. 633, 43 So. 791; Smith v. Holloway, 124 Ind. 329, 24 N. E. 886; 2 Elliott on Railroads (2d Ed.), § 938.

As to the extent of the right of way to which the railway company is entitled, we are of the opinion that by the long acquiescence of the Gladys City Company in the claim of the railway company, and the express concession of appellees in their petition, such right of way through the Gladys City tract is to the extent of 100 feet in width from the center of the railway track on each side, or 200 feet in width. The claim of the railway company to this extent is not disputed. There has been no such acquiescence as to the 200 feet north of the Gladys City tract, and, as to this part of their line, the railway company does not seem to have asserted any claim except to a right of way 100 feet wide, which is the extent of the right of way granted by the deeds of O'Brien and others. Neither by estoppel nor limitation have appellees acquired a right to a right of way of greater extent on this part of their line. This renders it unnecessary to decide several interesting questions presented as to the rights of appellees under the deed of Veatch, who, in fact, only owned an undivided one-sixth interest in the land, if it had been held that such deed conveyed also the right to take the oil, as to which right there had been no acquiescence, estoppel nor limitation.

The third assignment is unimportant and immaterial in view of our holding under the first assignment of error, as is also the fourth assignment.

As indicated by our findings of fact, we are of the opinion that the court erred in its finding of fact as set out in the fifth assignment of error, "that the railway company entered upon the Veatch survey and laid out its right of way 200 feet wide, and has in connection with its successor, the present railway company, continuously since that time used said land as and for railway purposes." This finding would indicate that the railway company laid out and has since used and occupied 200 feet across the entire survey as a right of way. We can find no evidence to authorize this finding as to the laying out and occupying of a right of way 200 feet wide except through the Gladys City tract, or that part laid off into lots, blocks, and streets. As to the remainder of the land, a right of way of only 100 feet was so laid off and occupied, as shown by our fact conclusions.

In the view we have taken as to the proper construction of the right of way deed, the finding of fact complained of by the sixth assignment of error, that "at the time the deed from S. H. Veatch to the East Texas Railway Company was executed the land covered thereby was regarded as being probably underlaid with oil and gas and that the Sour Springs mentioned in the deed were well known to both parties to the deed as prospective mineral land, and as indicating the presence of oil and gas," etc., was immaterial. While there was some evidence introduced tending

to show that at this time the land was regarded as probably underlaid with oil, this fact was considered immaterial by the trial court, who, after some of this evidence had been introduced without objection, excluded much more of it offered by appellee, on objection of appellants, as immaterial. What was introduced is sufficient probably to authorize the conclusion that the land was regarded as probably underlaid with oil and gas, as found by the court in the seventh conclusion of fact, not objected to, but we do not think that the evidence is sufficient to authorize the conclusion that this was known to S. H. Veatch at the time of the execution of the deed. We approve, and hereby adopt the conclusions embraced in the eighth paragraph of the court's conclusions of fact, except that portion thereof which finds that S. H. Veatch knew, at the time he executed the deed, that the land was probably oil land. This, however, we do not think material.

With regard to the seventh assignment of error, we think the trial court erred in so much of its tenth finding of fact as finds that "there was no evidence as to any other official of the railway company taking over or procuring, or even having knowledge of the execution of the deeds for the 100-foot right of way. These deeds were procured by Geo. W. O'Brien, attorney of the railway company, were delivered to it and kept and produced upon the trial of this case by it. This not only tends to show, but unexplained or uncontradicted conclusively shows, that the deeds were taken for the benefit of the railway company, and with its knowledge and by its procurement. With this exception the conclusions of the court in its tenth finding of fact are adopted by us.

With regard to the eighth assignment of error complaining of the finding of the court in its fifteenth finding of fact, "that during the year 1901 the railway company drilled a well in search for oil on its right of way on said Veatch survey," we are inclined to think that this finding is not supported by the evidence. The evidence tends to show that this well was in fact on the Douthitt survey, which, it seems to have been claimed, was in conflict with the Veatch. At any rate, it could not be concluded from the fact that appellants made no move to enjoin or prevent the boring of this well, which turned out to be a non-producer, that appellants acquiesced thereby in the claim of appellees to the oil under the 200 foot right of way across the Veatch survey under the deed from S. H. Veatch.

By their ninth assignment of error appellants complain of that part of the fifteenth finding of the trial court that "neither the plaintiff, Gladys City Company, nor the Guffey Company, ever claimed any right of dominion over or upon the right of way up to about the time this suit was filed." As ground for their complaint, it is urged in the

assignment that the evidence showed that in 1904, in making a settlement with the Howell-Trench claimants, both the Gladys City Company and the Guffey Company did claim and assert a right to the oil underlying said right of way. This seems to be a fact, as in the deeds executed in carrying out the settlement referred to it was expressly stipulated that the Gladys City Company did not part with any of its rights to the minerals under the right of way, and that the same mineral rights were reserved in the agreed decree in the federal court in 1904, but this does not impeach the court's finding objected to, which refers to nonclaim of any right of dominion "over or upon" the right of way. The objection thus made to the finding in paragraph 15 of the court's conclusions of fact must therefore be overruled.

The objection to the finding in the sixteenth conclusion of fact that, "in the settlement of what is known as the Trench-Howell litigation, the parties, claiming adversely to the Veatch heirs and their title, were awarded certain small portions of the land, some of which was laid off abutting said 200 foot right of way; that in the settlement the Gladys City Oil, Gas & Manufacturing Company and the J. M. Guffey Petroleum Company recognized the claim of the railway company to its 200-foot right of way by calling for the same in the conveyances made by them to the adversary claimants of the portion of said land abutting on said right of way"—is technically sound, in that in the deeds referred to the tracts conveyed are described as running to within 150 feet of the railroad track, instead of to the right of way. But the finding is substantially correct, as this point, 150 feet from the railroad track, would bring the tracts conveyed to the line of a 50-foot street laid off by the Gladys City Company between their property line and the line of the right of way extending 100 feet on each side of the center of the track. The finding is thus substantially correct, and the objection is overruled.

The eleventh assignment of error, which complains of omissions to find certain facts, cannot be sustained. It is believed to be the rule that where the trial court files conclusions of fact, if any further findings than those embraced in the conclusions are desired, the proper course is to request specific findings upon such points, in the absence of which the mere omission thereof in the court's conclusions cannot generally be availed of on appeal.

Appellants requested the court to make certain specific findings of fact, which request was refused, and to the ruling appellants took a bill of exceptions, and the point is presented by the twelfth assignment of error. It is contended by appellants, and the contention is supported by the statement subjoined to the proposition, that the facts thus requested to be found by the court are established by the undisputed evi-

dence. In the various briefs, arguments, supplemental briefs, etc., of appellees, we have not been able to find any specific answer to this assignment, or any attempt to deny the truth of the statement made as to the evidence of the facts embraced in the requested findings. In this state of the record, we would be authorized, if not required, under rule 41 (67 S. W. xvii), to accept these statements as true. So much of such findings as are not substantially embraced in other findings of the trial court and as should have been so embraced we have embraced in our conclusions of fact. The most material of such findings is that appellee has claimed from the north line of the Gladys City tract up to the north line of the Veatch survey a right of way only 100 feet in width. We cannot find any sufficient evidence to support the statement embraced in the court's fifth finding of fact, "that the railroad company entered upon the Veatch survey and laid out its right of way 200 feet wide and in connection with its successor, the present railway company, continuously used the said land as and for railway purposes," if by this is meant a continuous use and claim of the 20 feet. Veatch had only an undivided one-sixth interest in the land out of which the right of way was conveyed in 1881. In 1891, the attorney for the railway company took from parties who had succeeded to the title of all of the Veatch heirs, including S. H. Veatch, deeds for a right of way over the Veatch survey 100 feet in width, and they do not seem ever to have asserted a claim to more than the 100 feet thus conveyed, except over that part of the land included in the Gladys City tract, and as to this appellants do not contest and have acquiesced in the claim to a 200-foot right of way. They laid out the lots in Gladys City proper with reference to this right of way, but from the north line of Gladys City proper they laid off the land owned by them into farm lots only allowing for a right of way 100 feet wide. We do not understand that they contend here that appellees have not an easement or right of way 200 feet wide over that part of the land shown by the map to have been laid off into town lots, as Gladys City, and 100 feet wide north of that, and it seems to us that that is all appellees are entitled to under the practically undisputed evidence. The trial court found that the railway company, appellee, was entitled to a right of way 200 feet wide over the entire survey.

While the court was requested by appellant to hear evidence and determine the extent of the right of way over the entire survey, and they cannot complain, as they do in the thirteenth assignment, that the court did so, on the ground that the pleadings did not authorize it, still we think the court was in error in finding that the railway company had a right of way of more than one hundred feet in width over that part of the Veatch survey north of the Gladys City tract.

This disposes of all the assignments of error, but there is another question presented which has not been passed on. It is claimed by appellants in their petition, and by their briefs, that they are entitled to go upon the right of way and drill for and take oil within the right of way. To this we cannot agree. It is contended that the fact that the railway company has granted this right to an independent corporation, the Right of Way Oil Company, having no connection with the railway company, it cannot say that it would interfere with the operation of its business as a railway company for appellants to do the same thing. It is an answer to this, we think, that the voluntary grant by the railway company of the right of another to occupy a part of its right of way to the exclusion of the railway company cannot justify the occupation of any part of the right of way against the will of the railway company. It would depend at last upon whether such enforced occupation by appellants now would be an infringement of the right of the railway company. This issue was not passed upon by the court, nor are there any findings of fact thereon, but enough is shown to clearly indicate that, in order to enjoy the right claimed, appellants would have to appropriate to its own use exclusively some part of the surface of the ground within the right of way, and to that extent exclude appellee railway company therefrom. This, it was held by this court in Olive v. Sabine & East Texas Ry. Co., 11 Tex. Civ. App. 208, 33 S. W. 139, in which a writ of error was refused, would be an infringement of the rights of the railway company. In view of the great length of this opinion, we refrain from any further discussion of this question beyond a reference to the case referred to, which we think is decisive of the question. In rendering the judgment the title of appellant, the Gladys City Company, will be recognized to the land, subject to the exclusive use and possession of the railway company, but the right of appellants to enter upon the right of way for the purpose of boring for oil will be refused. The evidence was fully developed upon all the issues, and there is no necessity for remanding the cause. Our conclusion is that the judgment should be rendered by this court: First, That the Texas & New Orleans Railway Company have a right of way across the Veatch survey 100 feet in width, except that part thereof through the Gladys City tract, as to which it has a right of way 200 feet in width. Second, That the Gladys City Oil, Gas & Manufacturing Company has the fee-simple title to this land subject to the easement, as aforesaid, of the Texas & New Orleans Railway Company, so long as the same may be used by it as and for railway purposes. Third, That the Texas & New Orleans Railway Company has no right to the oil or other minerals beneath the surface of said strip comprising its right of way, as aforesaid, nor to sink wells and extract the same, but that such

oil is the property of the Gladys City Oil, Gas & Manufacturing Company and of its lessee, the J. M. Guffey Petroleum Company. Fourth, That the said Gladys City Oil, Gas & Manufacturing Company and the said J. M. Guffey Petroleum Company have no right to go upon said right of way and occupy the same for the purpose of sinking wells and extracting the oil. Fifth, That the said appellants recover of the appellees the value as found by the trial court of the oil extracted by the Right of Way Oil Company through the well bored by it on the right of way aforesaid. Sixth, That the Gulf Pipe Line Company have judgment over against the Right of Way Oil Company for whatever amount it may be required to pay under judgment against it.

Let the judgment be so entered.

Reversed and rendered.

On Motion for Rehearing.

It is proper that brief reference be made to two contentions presented by appellee on motion for rehearing.

The judgment rendered by this court is in favor of the Gladys City Company and the Guffey Petroleum Company. If it was error to render judgment for the Guffey Company, it is not one that operates to the prejudice of appellee, but only to the prejudice of its coplaintiff, the Gladys City Company. Whatever rights were not conferred upon the Guffey Company by the terms of the lease remain in the Gladys City Company. The judgment is in favor of both of them jointly, and it is not material to appellee how the matter is settled between them.

Appellee further contends that the judgment is erroneous, in that it awards to appellants the value of the oil delivered to the Gulf Pipe Line Company instead of such value, less the cost of extraction. We quite readily agree with appellee that appellees in boring the well and extracting the oil acted under the belief, in good faith and upon reasonable grounds therefor, that they had a right to do so, and that the oil belonged to the Texas & New Orleans Railway Company. In such case, under proper allegations and proof, it would have been proper to have deducted from the value of the oil in the tanks of the Gulf Pipe Line Company the reasonable value of extracting the same. Bender v. Brooks, 127 S. W. 170.

But there are neither pleadings nor evidence presenting this issue. The plaintiffs sued for the value of this oil, alleged to be 80 cents per barrel. Neither by plea nor exceptions was this measure of damages controverted or put in issue. There are neither allegations nor proof as to the value of extracting the oil. The court found the quantity of oil and its value, to wit, 80 cents per barrel. No finding as to the cost of

extraction was requested, nor, indeed, could such finding have been made upon the evidence. The court does find the cost of boring the well, but this alone was not sufficient either for the trial court or this court to determine the reasonable cost of extraction, so as to determine the measure of appellant's recovery under the rule contended for by appellees. No reference is made in the briefs of appellees, nor in the oral argument, to the question now here presented for the first time in the motion for a rehearing. In the circumstances we do not think that our judgment is erroneous in the matter complained of, as the case is presented by the record.

The motion for rehearing is overruled.

Overruled.

BUTTE CITY SMOKE-HOUSE LODE CASES.

[Supreme Court Montana, January 21, 1887.]

6 Mont. 397, 12 Pac. 858.

1. **Mining Claims—Patents—Courts Will Not Go Behind.**

Courts will not go behind patents and ascertain from proofs which of disputing parties has the better right, where neither could have, by his patent acquired any right or title to the property granted the other by his patent.

2. **Same—Patent Relates to Location.**

The patent to a mining claim relates back to the date of location and protects it.

3. **Same—Town-site Patent Cannot Affect.**

No interest in, or title to a valid mining location can be acquired by a town-site patent.

4. **Mining Patent—Town-site Patent—District Grants.**

There is no conflict between a mining claim patent and a town-site patent. They evidence distinct grants, and cannot conflict with one another.

5. **Mining Patent—Town-Site Patent—Authority of Land Department.**

Officers of land department have no authority to convey mining claim by town-site patent or town site by mining claim patent.

6. **Same—Void Restrictions and Exceptions.**

Restrictions and exceptions not authorized by law, placed in patent to mining claim by officials of land department, are void.

7. **Town-site Patent—Contest by Mine Locator.**

It is not necessary for the owner of a mining location to file an adverse claim to an application for a town-site patent.

8. **Mining Patent—Contest by Town-site Claimant.**

Claimants of a town site which includes a mining claim should file adverse claim to application for patent to the mining claim.

9. **Same—As Evidence.**

Patent to mining claim is evidence that the law has been complied with in all proceedings leading up to its issuance, and fixes the mineral character of the claim.

CASE NOTE.

Patent to Mining Claim Relates Back to Date of Location.

Where a patent is issued for a mining claim it relates back and confers title as of the date of location. Witherspoon v. Duncan, 71 U. S. (4 Wall.) 210 (1866); Stark v. Starr, 73 U. S. (6 Wall.) 402, 18 L. Ed. 925 (1869); Heydenfeldt v. The Daney Gold & Silver Min. Co., 93 U. S. 634, 13 Mor. Min. Rep. 204 (1876); St. Louis Smelting Co. v. Kemp, 104 U. S. 636, 26 L. Ed. 875, 11 Mor. Min. Rep. 673 (1881); Deffenback v. Hawke, 115 U. S. 392, 6 Sup. Ct. 95, 29 L. Ed. 423 (1885); Cornelius v. Kessel, 128 U. S. 456, 460, 9 Sup. Ct. 122, 32 L. Ed. 482 (1888); United States v. Iron & S. M. Co., 128 U. S. 673, 9 Sup. Ct. 195, 32 L. Ed. 571 (1888); Dahl v. Raunheim, 132 U. S. 260, 10 Sup. Ct. 74, 33 L. Ed. 324, 16 Mor. Min. Rep. 214 (1889); Hastings, etc. Railroad Co. v. Whitney, 132 U. S. 357, 10 Sup. Ct. 112, 33 L. Ed. 363 (1884); Davis v. Weibbold, 139 U. S.

Actions in ejectment by claimant under mining claim patent against claimants under town-site patents. Judgment for plaintiff. Affirmed.

For appellants—Knowles & Forbes.

For respondents—W. W. Dixon.

WADE, C. J. The foregoing cases are actions in the nature of ejectment, the plaintiff and respondent claiming title and the right of possession under the Smoke-house quartz-lode mining claim, issued March 15, 1881, and the defendants and appellants in each case claiming title and right of possession under the patent of the Butte town site, issued on the twenty-sixth day of September, 1877. These causes arise under the same patents, and in every material respect are similar to each other, and to the case of Talbott v. King, 6 Mont. 76, S. C. 9 Pac. Rep. 434 (decided by this court at the January term, 1886,) and are parallel to the case of Silver Bow M. & M. Co. v. Clark, 5 Mont. 378, S. C. 5 Pac. Rep. 570 (decided by this court at the January term, 1885;) but as the court, under the act of congress of July 10, 1886, has been reorganized since these decisions were rendered, by increasing the number of justices, and by the appointment of two justices who did not take a part in those decisions, we have considered the questions involved herein as still open, and as if presented here for the first time.

The theory of the decisions in the case of Talbott v. King, and in the case of Silver Bow M. & M. Co. v. Clark is that a valid location of a quartz-mining claim on the public mineral lands of the United States is a grant from the government to the locator thereof, and carries with it the right, by a compliance with the law, of obtaining a full and complete title; that, after such a location, the lands included within its boundaries are withdrawn from sale and pre-emption; that the patent relates back to the location, and is the consummation of the grant, which by the location had its inception; that a valid location, kept alive by

507, 11 Sup. Ct. 628, 35 L. Ed. 238 (1890); Benson Mining & S. Co. v. Alta Min. & S. Co., 145 U. S. 428, 12 Sup. Ct. 877, 36 L. Ed. 762, 17 Mor. Min. Rep. 488 (1892); Bardon v. Northern Pac. R. Co., 145 U. S. 535, 12 Sup. Ct. 856, 36 L. Ed. 806 (1891); Calhoun Gold Min. Co. v. Ajax Gold Min. Co., 182 U. S. 499, 21 Sup. Ct. 885, 45 L. Ed. 1200, 21 Mor. Min. Rep. 381 (1901); Eureka Consol. Min. Co. v. Richmond Min. Co., 4 Sawy. 303, Fed. Cas. No. 4548, 9 Mor. Min. Rep. 578 (1877); Pacific Coast Min. & M. Co. v. Spargo, 16 Fed. 348, 16 Mor. Min. Rep. 75 (1883); Bogan v. Edinburgh American Land Mortgage Co., 63 Fed. 192, 11 C. C. A. 128 (1894); Montana Central R. Co. v. Migeon, 68 Fed. 811 (1895); Bunker Hill M. & Concentrating Co. v. Empire State Idaho Min. & Dev. Co., 108 Fed. 189 (1900), affirmed 109 Fed. 538, 48 C. C. A. 665, 21 Mor. Min. Rep. 317 (1901); Teller v. United States, 113 Fed. 273, 51 C. C. A.

representation and a compliance with law, gives to the locator, or his grantees, the right to the exclusive possession and enjoyment of the surface of the claim located; that the office of an adverse claim is to have determined, by a court of competent jurisdiction, the right to such possession; that, if an adverse claim is not made at the time and in the manner prescribed by law, the same is thereafter barred; that the issuance of a patent to a quartz-lode mining claim is conclusive upon the court in an action at law; that the discovery, location, marking, and bounding, and all proceedings up to the issuance of the patents, were regular and as required by law; that it is impossible, under a patent to a town site, to acquire any interest in any mine of gold, silver, cinnabar, or copper, or in any valid mining claim or possession, held under existing laws; that, as to any such mine or mining claim or possession, a patent to a town site did not take hold of, operate upon, or in any manner affect it; that an exception in a mining claim patent, excluding therefrom all lots, blocks, streets, alleys, houses, and municipal improvements on the surface of the claim, is unauthorized and void; that an exception in a town-site patent, excluding from its operation all mines, mining claims, and possessions held under existing laws, is an exception required by the law, and is made by the law itself, and is conclusive upon the question that the government did not, and did not intend by such town-site patent to, convey any valid mine, mining claim, or possession held under existing laws.

We believe that the theory upon which the cases of Talbott v. King and Silver Bow M. & M. Co. v. Clark were decided, is correct, and the decisions in those cases are hereby approved and confirmed.

The theory of appellants seems to be that the town-site patent conveys all the grounds included within the boundaries of the town site, regardless of prior conveyances to other parties; that, in the issuance of such a patent, the officers of the government decided that the grounds within the boundaries of the town site were not valuable for mineral purposes;

236 (1901); Fetter v. United States, 117 Fed. 577 (1902); Neilson v. Champagne Min. & M. Co., 119 Fed. 123, 22 Mor. Min. Rep. 438 (1902); Last Chance Min. Co. v. Bunker Hill S. & C. Co., 131 Fed. 579 (1904); Tombstone Town-site Case, 2 Ariz. 272, 15 Pac. 26 (1887); Alta M. & S. Co. v. Benson, etc. Co., 2 Ariz. 371, 16 Pac. 565 (1888); Yount v. Howell, 14 Cal. 465 (1859); Ely v. Frisbie, 17 Cal. 250 (1861); Galbraith v. Shasta Iron Co., 143 Cal. 94, 76 Pac. 901 (1904); Silver Bow Min. Co. v. Clark, 5 Mont. 378, 5 Pac. 570 (1885); Talbot v. King, 6 Mont. 76, 9 Pac. 434 (1886); Butte City Smoke-House Lode Cases, principal case; Chamber v. Jones, 17 Mont. 158, 42 Pac. 758 (1895); Hickey v. Anaconda Copper Min. Co., 33 Mont. 46, 81 Pac. 806 (1905); Courchaine v. Bullion Mining Co., 4 Nev. 369, 12 Mor. Min. Rep. 235 (1868); Deno v. Griffin, 20 Nev. 249, 20 Pac. 308 (1889); Sharkey v. Candiani, 48 Or. 112, 85 Pac.

that the words in the patent excluding from its operation all mines, mining claims, and possessions held under existing laws, was not an exception that excluded any lands from the Butte town site; that the issuance of the Smoke-house patent did not decide that the premises embraced therein was a valid mining claim and possession at the date of the issuance of the town-site patent; that, if the failure to contest the application for the Smoke-house patent waived all rights to such mining claim, then the failure of the Smoke-house claimants to contest the town-site application was a waiver of any rights to the grounds embraced in the town-site patent; that the grant derived from the location of a mining claim is an independent grant from that derived from a patent to the same ground, and that the location of a mining claim is not the first step towards the obtaining of a patent for such claim; that the patent issued for the Smoke-house mining claim was an adjudication by the land department that all lots, blocks, streets, alleys, etc., should be excepted from such patent; that the grantees accepted the patent to the Smoke-house mining claim with those exceptions in the same, and are bound thereby; that the applicants were not barred from proving their alleged estoppel; and that, as both these parties claim by patents, the court should have gone back of the patents, and determined from the proof who had the better right.

We do not think the acts of congress in relation to acquiring title to mining claims and town sites warrant or uphold this theory of appellants. Why should the court have gone behind the patents, and ascertained from the proofs which of these parties had the better right, when it was not possible for either to have acquired any right or title to the property of the other by virtue of his patent? Their patents do not cover or touch the same property. By the express terms of the law, and by the express terms of the town-site patent, all valid mines, mining claims, and possessions held under existing laws were excluded from the opera-

219, 1 L. R. A. (N. S.) 791 (1906); Kahn v. The Mining Co., 2 Utah 174, 11 Mor. Min. Rep. 645 (1877-1880).

While under issuance of patent, title relates back to the time of location, the patent does not conclusively fix the date of the location, as the date of location is not one of the essential facts neccessary to support the judgment of the land department in issuing a patent. Bunker Hill & S. Min. & Consol. Co. v. Empire State Idaho Min. & D. Co., 108 Fed. 189 (1900), affirmed 109 Fed. 538, 48 C. C. A. 665, 21 Mor. Min. Rep. 317 (1901).

Upon payment for the land and receipt entitling the purchaser to a patent, the purchaser becomes the equitable owner of the land in fee, with the absolute, unrestricted right to use and exercise dominion over it, and the government holds the mere naked title until the patent can issue. Teller v. United States, 117 Fed. 581 (1902).

The issuance by the government of its patent for a mining claim is conclusive evidence of the sufficiency of all steps

tion of that patent. At the time of the issuance of the town-site patent in 1877, the Smoke-house location had, for more than two years, been a valid mining claim and possession. This is evidenced by the subsequent issuance of a patent for such mining claim in pursuance of a location in 1875. There are no authorities that dispute the doctrine that the patent relates back to the location, and protects it. The location is the inception of the grant, of which the patent is the consummation. The government does not go through the performance of making two grants of one mining claim to the same person, or to his successors in interest.

The Smoke-house location, being a valid mining claim at the time, was expressly excepted from the operation of the town-site patent, and it was not possible by such a patent to have obtained any interest therein or title thereto. There is no conflict between a town-site patent and a mining-claim patent, and can be none. They evidence separate and distinct grants, and cannot conflict with one another. The one conveys a mining claim, an independent grant, and the other conveys ground for a town site, from, which, by the law, all valid mining claims and possessions are excluded. Many valuable mines, mining claims, and possessions are held and owned by perfect titles, over which town sites have been extended, and there can be no conflict between them. The two titles take hold of and affect property that is entirely separate and distinct.

The officers of the land department had no authority to convey a mining claim by the issuance of a town-site patent, and no authority to convey a town site by the issuance of a mining-claim patent. At the time of issuing the town-site patent, they had no authority to declare that the Smoke-house location was not a valid mining claim and possession; and, having no such authority, they excluded from the operation of the town-site patent all mines, mining claims, and possessions, as the law required.

But it is said that the patent issued for the Smoke-house claim was an adjudication by the land department that all lots, blocks, streets, and alleys should be excepted from such patent. If this be true, then the

necessary to establish its validity. Last Chance Min. Co. v. Bunker Hill & S. Min. & C. Co., 131 Fed. 579 (1904).

A patent duly signed, countersigned, and sealed, not merely operates to pass the title, but is in the nature of an official declaration that all the requirements preliminary to its issue have been complied with. The presumptions attending it are not open to rebuttal. Galbraith v. Shasta Iron Co., 143 Cal. 94, 76 Pac. 901 (1904).

There are no authorities that dispute the doctrine that the patent relates back to the location, and protects it. The location is the inception of the grant, of which the patent is the consummation. Butte City Smoke House Lode Cases, principal case.

All matters pertaining to the issuance of patent for a mining claim, the discovery and location, the marking and bounding so that the claim may be identified, and its lines readily traced, the

land department can make adjudications without authority of law. The Smoke-house location carried with it the right to the exclusive possession and enjoyment of all the surface ground included within the boundaries of the location. This right is given by an act of congress; it is the very essence and substance of the title to quartz-mining claims; and, having a valid location, this title and grant cannot lawfully be taken away or defeated. There is no law authorizing the land-officers to exclude from a mining-claim patent the right to such surface ground, and consequently any attempt to do so is necessarily void. The patentee of such a patent is entitled to what the law gives him, and his rights cannot be abridged or taken from him by the unauthorized or unlawful acts of any one. There is no force in the proposition that the land department adjudicated the surface ground of the Smoke-house patent, or that the grantees of such patent are bound by an unlawful exception. Their rights are defined by the law, and in asserting them they do not encroach upon any rights acquired by the town-site patent.

And now, why should the owners of the Smoke-house location have filed an adverse claim to the application for the town-site patent? They knew that the town-site patent,, when issued, would exclude from its operation all valid mines, mining claims, and possessions, and therefore they had no adverse claim. They could not object to the issuance of the town-site patent, for it could not interfere with or in any manner affect the Smoke-house location. Suppose they had filed an adverse claim, they would have been informed that they were meddling with what did not concern them. They would have been told that the town-site patent, when issued, could not touch the Smoke-house location.

But it is contended that, if it was not necessary for the Smoke-house owners to make an adverse claim to the town-site application, therefore the town-site claimants were in like manner relieved from filing their adverse claims to the Smoke-house application for a patent. It is also said that the town-site claimants were the owners by the patent at the time the Smoke-house application for a patent was made, and, having a patent, they were relieved from making any adverse claim to the

notice, and the work and labor to be performed, are all matters that come before the land department, and are conclusively adjudicated therein. That department supervises the issuance of the patent. It is a special tribunal created for that purpose and within the scope of its jurisdiction its adjudications are final and conclusive. Before a mining-claim patent can issue, it must be established in the land office by competent evidence that there has been a discovery within the boundaries of the claim, and a notice and location according to the law, that the necessary work has been done, and that all preliminary and precedent acts have been performed which authorize and justify the issuance of the patent, and the patent itself is evidence of the regularity of all these acts. Chambers

Smoke-house application. It is also argued that adverse claims to applications for patents to mining claims can only be made by those who claim some interest in the property as a mining claim, and therefore that those who claimed the surface ground of the Smoke-house location, for the purpose of lots, blocks, streets, and alleys, were relieved from the necessity of making an adverse claim to the Smoke-house application. It does not follow that because the Smoke-house owners were not required to make an adverse claim to the town-site application for a patent, therefore that the town-site owners were relieved from making adverse claim to the Smoke-house application. The town-site application was not adverse to the Smoke-house location; but the Smoke-house application for a patent, which was the assertion of a right to the exclusive possession and enjoyment of the surface ground included within the boundaries of the location, called upon every one claiming any interest in the surface ground to set up their adverse claim. And the mere fact that the town-site claimants held under a patent from which all valid mining claims and possessions are excluded, did not relieve them from setting up their adverse claim.

Claimants under a town-site patent are not relieved from making an adverse claim, if they have one, to an application for a patent to a mining claim within the boundaries of the town site. In such a case both parties would claim the exclusive right to the possession and enjoyment of the ground,—the one by his discovery and location of a mining claim, the other by virtue of his deed from the probate judge. If there had been no discovery, or no location according to law, an adverse claim by the lot owner would have shown this condition, and defeated the application for a patent; and when this application was made, was the time for the town-site claimant to make known his adverse claim; and, if, by his laches or neglect, he permitted the statutory time to pass, he thereby lost his right.

The opinion of Mr. Justice Field in the case of Deffeback v. Hawke, 115 U. S. 392, S. C. 6 Sup. Ct. Rep. 95, rendered in the Supreme Court of the United States at the October term, 1885, is instructive, and covers

v. Jones, 17 Mont. 158, 42 Pac. 758 (1895).

The patent is a mere perfection of the right originated by the location and to which it takes effect by relation and, therefore, the location is not affected by a subsequent location and issuance of patent for a town site. Chambers v. Jones, 17 Mont. 158, 42 Pac. 758 (1895).

The patent is not conclusive of the fact that a declaratory statement in due form of law was filed for record. When a patentee seeks to show that his title is older than the evidence of his title indicates,—when he seeks to show that, notwithstanding the date of his patent or receiver's final receipt, his title in fact relates back to the date of his location,—he must show affirmatively a location valid under the laws of the state where

many of the points and propositions in the cases before us. In that case the plaintiff relied upon a patent of the United States for the land in controversy, issued under the laws for the sale of mineral lands. The defendant set up as ground for equitable relief, against the enforcement of the rights of the plaintiff, under the patent, that his grantor occupied the land as a lot in the town site of Deadwood, and made improvements thereon, before the plaintiff claimed it as mining ground, or took proceedings to procure a title. The defendant therefore denied the right of the plaintiff to acquire the premises as a mining claim on the town site, and he also contended that, if the plaintiff had that right, the patent issued to him should have contained reservations excluding from its operation the buildings and improvements of the defendant, and whatever was necessary for their use and enjoyment.

In deciding the case Justice Field said: "In the present case there is no dispute as to the mineral character of the land claimed by the plaintiff. It is upon the alleged prior occupation of it for trade and business, the same being within the settlement or town site of Deadwood, that the defendant relies as giving him a better right to the property. But, the title to the land being in the United States, its occupation for trade or business did not and could not initiate any right to it, the same being mineral land, nor delay proceedings for the acquisition of the title under the laws providing for the sale of lands of that character. And those proceedings had gone so far as to vest in the plaintiff a right to the title before any steps were taken by the probate judge of the county to enter the town site at the local land office. The complaint alleges, and the answer admits, that on the twentieth day of November, 1877, the plaintiff applied to the United States land-office at Deadwood to enter the land as a placer mining claim, and that on the thirty-first day of January, 1878, he did enter it as such, by paying the government price therefor. No adverse claim was ever filed with the register and receiver of the local land office, and the entry was never canceled nor disapproved by the officers of the land department at Washington."

Here is a recognition of the doctrine that lotowners in a town site

the claim is situated. Hickey v. Anaconda Copper Min. Co., 33 Mont. 46, 81 Pac. 806 (1905).

Under the Act of Congress of 1872 where a party applying for a patent to mining ground gives the proper notice as therein required, any other claimants can object to the issuance of the patent, either on account of its extent or form or because of asserting prior location. They must come forward with their objections and present them or they will be precluded from objecting to the issuance of the patent. Therefore, the doctrine of relation applies to patents to mining claims so as to cut off intervening claimants if any there should be, such as might arise from a subsequent location. Deno v. Griffin, 20 Nev. 249, 20 Pac. 308 (1889).

even though the town-site entry had not been perfected, should have filed their adverse claims, if any they had, to the application for a patent to mining ground, and that their failure so to do barred their right.

Justice Field continues: "The right of the government, therefore, passed to him; and, though its deed, that is, its patent, was not issued to him until January 31, 1882, the certificate of purchase, which was given to him upon the entry, was so far as the acquisition of title by any other party was concerned, equivalent to a patent. It was not until the twenty-eighth of July following that the probate judge entered the town site. The land had then ceased to be the subject of sale by the government. It was no longer its property. It held the legal title only in trust for the holder of the certificate. Witherspoon v. Duncan, 4 Wall. 210, 218. When the patent was subsequently issued, it related back to the inception of the right of the patentee."

And so we say that, by the location of the Smoke-house claim, the ground included within its boundaries ceased to be the subject of sale by the government. It was no longer the property of the government. It held the legal title in trust for the locator of the claim, or his grantees; and, when the patent was subsequently issued, it related back to the inception of the right of the patentee, which was the location of the claim.

Speaking of reservations and exceptions of municipal improvements in a patent to a mining claim, Justice Field fully justifies all we have said on that subject. His language is as follows: "The position that the patent to the plaintiff should have contained a reservation, excluding from its operation all buildings and improvements not belonging to him, and all rights necessary or proper to the possession and enjoyment of the same, has no support in any legislation of congress. The land-officers, who are merely agents of the law, had no authority to insert in the patent any other terms than those of conveyance, with recitals showing a compliance with the law, and the conditions which it prescribed. The patent of a placer mining claim carries with it the title to the surface included

A patent to a mining claim is conclusive that all requirements necessary to its issuance have been fulfilled. Sharkey v. Candiani, 48 Or. 112, 85 Pac. 219, 7 L. R. A. (N. S.) 791 (1906).

The rights acquired under a patent to a mining claim relate back to the date of location, and are the final consummation of that act. If officers of the land department insert in the patent unauthorized restrictions or inclusions, these cannot affect the right of the patentee. Silver Bow Min. & Mill. Co. v. Clarke, 5 Mont. 378, 5 Pac. 570 (1885).

Exception in patent which is not authorized by law has no effect thereon, as the patent relates back to the date of the location. Talbot v. King, 6 Mont. 76,

within the lines of the mining location, as well as to the land beneath the surface."

Speaking of the possibility of acquiring title to a mineral claim by virtue of a town-site patent, Justice Field continues: "While we hold that a title to known valuable mineral land cannot be acquired under the town-site laws, and therefore could not be acquired to the land in controversy under the entry of the town site of Deadwood by the probate judge of the county in which the town is situated, we do not mean to be understood as expressing any opinion against the validity of the entry, so far as it affected property other than mineral lands, if there were any such at the time of the entry."

That is equivalent to saying, what we have already said in this decision, that the town-site patent took hold of the non-mineral lands included within its limits, but did not touch or in any manner affect the mining claims therein; and hence that the patent to the Butte town-site did not affect the Smoke-house location; and, further, that there is not and cannot be any conflict between a town-site and a mining claim patent.

The decision of Justice Field continues: "The act of congress relating to town sites recognizes the possession of mining claims within their limits; and in Steel v. Smelting Co., 106 U. S. 447 (S. C. 1 Sup. Ct. Rep. 389) we said that 'lands embraced within a town site on the public domain, when unoccupied, is not exempt from location and sale for mining purposes; its exemption is only from settlement and sale under the pre-emption laws of the United States. Some of the most valuable mines in the country are within the limits of incorporated cities, which have grown up on what was, at its first settlement, part of the public domain; and many of such mines were located and patented after a regular municipal government had been established.' It would seem, therefore, that the entry of a town site, even though within its limits mineral lands are found, would be as important to the occupants of other lands as if no mineral lands existed. Nor do we see any injury resulting therefrom, nor any departure from the policy of the government; the entry and the patent being inoperative as to all lands known at the time to be valuable

9 Pac. 434 (1886).

As to the rights to a mining claim acquired by possession, see note to Dwinnell v. Dyer, p.—, vol. 3, this series.

As to petroleum and other mineral oils and natural gas being minerals, and subject to location under the mining laws, see note to Whiting v. Straup, p. ——, vol. 2, this series.

As to good faith required of mining partners in their dealings with each other, see note to Walker v. Bruce, p. ——, vol. 3, this series.

As to mining partnership not being dissolved by sale of interest by, or death of one copartner, see note to Loy v. Alston, p. ——, vol. 3, this series.

for their minerals, or discovered to be such before their occupation or improvement for residences or business under the town-site title."

In the case of Sparks v. Pierce, 115 U. S. 412, S. C. 6 Sup. Ct. Rep. 102, it is said that a patent to a mineral claim is itself evidence that all the requirements of the law for its sale have been complied with.

And so the Smoke-house patent was itself evidence that, in the discovery, the location of the claim, and in all proceedings up to the issuance of the patent, the law had been complied with. The Smoke-house location was known to exist before the town-site entry. This patent related back to the location in 1875, and fixes the mineral character of the claim at that time, and at all subsequent times, up to the date of the issuance of the patent in 1881. It was, therefore, a valid mining claim and possession in 1877, when the town-site patent was issued, and necessarily excepted therefrom.

The judgment, in each of the foregoing cases is hereby affirmed with costs.

AVERY v. JOHNSON.

[Supreme Court of Washington, July 13, 1910.]

59 Wash. 332, 109 Pac. 1028.

1. Waters and Water Courses—Indian Reservations—Appropriation Cannot Antedate Opening.

No right of appropriation of waters on Indian reservation could antedate opening of reservation to settlement, and no such right could antedate actual bona fide settlement upon contiguous lands capable of being irrigated by the waters of a stream.*

2. Same—Appropriation—Qualifications of Appropriator.

If the party seeks to claim water for irrigating agricultural land by appropriation, he must own the land sought to be irrigated or be an actual bona fide settler having a possessory interest.

3. Same—Not by Squatter or Speculator.

The right of a squatter or speculator to claim the right of appropriation has not been recognized by custom nor sanctioned by statute.

4. Same—Mere Squatter Has no Rights.

A mere squatter can claim no right either as an appropriator or as a riparian proprietor.

CASE NOTE.

Who May Make an Appropriation.

I. Owner or Possessor of Property.

A. In General.

If a party seeks to claim water for irrigating agricultural land by appropriation, he must own the land sought to be irrigated or be an actual, bona fide settler having a possessory interest. Avery v. Johnson, principal case.

The ownership or possession of land capable of being made productive by irrigation is essential to an appropriation under the Arizona law. Slosser v. Salt River Valley Canal Co., 7 Ariz. 376, 65 Pac. 332 (1901).

*As to right to construct or maintain ditch or canal on unsurveyed government land and government reservations, see note to United States v. Lee, *ante*, p. 479.

5. Same—Irrigation—Appropriator Entitled Exclusively to Quantity Appropriated.

It is an elementary law of appropriation of water for irrigation that the first appropriator is entitled to the quantity of water appropriated by him to the exclusion of subsequent claimants by appropriation or riparian ownership.

Action to restrain diversion of water for purposes of irrigation and fix respective rights. Judgment for defendant. Reversed and remanded, with directions to enter decree fixing amount of water to which plaintiffs are entitled, etc.

For appellant—Alvin W. Barry.

For appellee—E. Fitzgerald.

CHADWICK, J. The south half of the Colville Indian Reservation was opened to settlement on October 10, 1900. At that time one Georgie A. Warren made homestead entry of a certain 160-acre tract of land riparian to Antoine Creek, a small stream flowing from the northeast into the Okanogan River. At about the same time, C. C. Kloppenstein made homestead entry of a 160-acre tract lying east of the Warren entry. The lands in their natural state were semi arid and incapable of producing crops without irrigation, but with irrigation the lands were

An appropriator must make actual beneficial use of the water on land which he owns or possesses. Gould v. Maricopa Canal Co., 8 Ariz. 429, 76 Pac. 1125 (1904); Tucker v. Jones, 8 Mont. 225, 19 Pac. 571 (1888).

One may not acquire a water right upon the lands of another without acquiring an easement in such land. Smith v. Denniff, 24 Mont. 22, 60 Pac. 398, 81 Am. St. Rep. 408, 50 L. R. A. 741 (1900); Prentice v. McKay, 38 Mont. 114, 98 Pac. 1081 (1909).

Appropriator must be in a position to make a beneficial use of the water presently or within a reasonable time. Smith v. Duff, 39 Mont. 382, 102 Pac. 964, 133 Am. St. Rep. 587 (1909).

B. Effect of Local Laws.

Where the local laws or customs permit an appropriation by one who is not a land owner such an appropriation is valid. Thorpe v. Tenem Ditch Co., 1 Wash. 566, 20 Pac. 588 (1899).

C. Equitable Title Sufficient.

An equitable title is sufficient to support the right of appropriation. Watts v. Spencer, 51 Or. 262, 94 Pac. 39 (1908).

D. Leasehold Estate Sufficient.

Appropriation may be made by one holding a leasehold estate. Sayre v. Johnson, 33 Mont. 15, 81 Pac. 389 (1905).

E. Riparian Ownership Not Necessary.

Where an appropriation is made for the purposes of irrigation it is not necessary that the lands to be irrigated be situated on the bank of the stream. Hammond v. Rose, 11 Colo. 524, 19 Pac. 466, 7 Am. St. Rep. 258 (1888).

Right to obtain water by appropriation is not confined to riparian owners. Boquillas Land & Cattle Co. v. St. David Co-Op. Commercial & Develop-

capable of producing fruit, hay, and like products in great abundance. The plaintiffs Fruit succeeded to the rights of Warren, and plaintiff Avery to the rights of Kloppenstein. Both of the original entry men and their successors, these plaintiffs, began and have continued with reasonable diligence to irrigate their lands, and they have from year to year increased the cultivated and irrigated area, so that there are now on the Warren entry about 115 acres in cultivation, and on the Kloppenstein tract about fifty-four acres, put to profitable uses by irrigation from the waters of Antoine Creek. The full flow of the creek does not exceed three and one-half cubic feet per second from June to September, and in the extreme dry season does not exceed two and one-half feet, and it is shown, we think, by the testimony of both sides, that this is not more than enough to successfully irrigate the lands of the plaintiffs. In 1901, George Rice made homestead entry of 160 acres above the Kloppenstein lands. He cleaned out an old irrigation ditch, which had been used by some squatter or squaw man prior to the time the reservation was opened, but did not put the water to any beneficial use. In 1902, Rice relinquished to one Crosby. Crosby never made any entry of the lands, being content, so far as the record shows, to remain a

ment Ass'n, 11 Ariz. 128, *sub nom.* Boquillas Land & Cattle Co. v. Curtis, 89 Pac. 504 (1907).

A nonriparian owner may divert water for domestic use. Town of Sterling v. Pawnee Ditch Extension, 42 Colo. 421, 94 Pac. 339, 15 L. R. A. (N. S.) 238 (1908).

The appropriator need not be a riparian owner on the stream from which the diversion is made. Willey v. Decker, 11 Wyo. 496, 73 Pac. 210, 100 Am. St. Rep. 939 (1903).

F. Vendee under Contract to Purchase.

One in possession under contract to purchase may make an appropriation. Smith v. Denniff, 24 Mont. 20, 60 Pac. 398, 50 Am. St. Rep. 741, 50 L. R. A. 741 (1900).

II. Settlers on Public Lands.

The right of appropriation may be exercised by a settler on the public domain. Porter v. Pettingill, p. ——, vol. 3, this series.

A water right may be acquired by appropriation by settlers upon the public lands. Davis v. Chamberlain, 51 Or. 304, 98 Pac. 154 (1908).

III. Squatters on Public Lands.

A mere squatter can claim no rights either as an appropriator or as a riparian proprietor. Avery v. Johnson, principal case; Alta Land Co. v. Hancock, 85 Cal. 219, 24 Pac. 645, 20 Am. St. Rep. 217 (1890); Smith v. Logan, 18 Nev. 149, 1 Pac. 678 (1883); Kendall v. Joyce, 48 Wash. 489, 93 Pac. 1091 (1908).

Where water is appropriated by a mere squatter upon government land, who afterwards obtains a patent thereto, the time of use of the water while he was such squatter may be tacked to his use after obtaining the patent. Meng v. Coffey, 67 Neb. 500, 93 N. W. 713, 108 Am. St. Rep. 697, 60 L. R. A. 910 (1903).

A squatter upon the public lands may by actual beneficial use obtain such title to water that it may be conveyed

squatter until he could dispose of his "right," which he did in the fall of 1904, to the defendants, who made settlement in November of that year, and have since complied with the homestead laws and now own the land. The testimony differs as to the amount of land irrigated by defendants. They say about twenty acres in 1905, and increasing until at the present time the irrigated tract runs from thirty-five to forty acres; while the plaintiffs' evidence would indicate that the present irrigated area does not exceed twenty-three acres, including seven or eight acres on some "scrip" land lying further up the creek. The court made a decree, dividing the use of the waters of the creek between all the parties, and plaintiffs have appealed.

The court found, and we think properly, that no right of appropriation in any of the parties could antedate the opening of the reservation to settlement; and for the same reasons it would follow that no right could antedate an actual bona fide settlement upon contiguous lands capable of being irrigated by the waters of the stream. Hence, no rights would attach to respondents' land by reason of the fact that a squatter or squaw man took out ditches some years before the reservation was opened, and none could attach by reason of Rice's homestead entry, or, if they did, they were lost by Crosby who, although he put in a

and the rights of the vendee relate back to the original diversion. Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1093, 102 Pac. 728 (1909).

Riparian rights are an incident of ownership, and therefore cannot be acquired by a mere squatter. Kendall v. Joyce, 48 Wash. 489, 93 Pac. 1091 (1908).

No rights can be acquired in an Indian reservation prior to the opening thereof, and hence no right would attach by reason of a squatter or squaw man taking out ditches before the reservation was opened. Avery v. Johnson, principal case.

IV. Trespassers.

A trespasser on riparian land cannot lawfully exercise any right to such water or acquire any right there by virtue of sections 180 *et seq.* of the Montana Civil Code. Alta Land Co. v. Hancock, 85 Cal. 219, 24 Pac. 645, 20 Am. St. Rep. 217 (1890); Smith v. Denniff, 24 Mont. 22, 60 Pac. 398, 81 Am. St. Rep. 408, 50 L. R. A. 741 (1900); Hough v. Porter, 38 Mont. 114, 98 Pac. 1081 (1909).

Where a trespasser appropriates water and conveys his right thereto to one who afterwards becomes a lessee of the land, the latter may hold the right. Seaweard v. Pacific Livestock Co., 49 Or. 157, 88 Pac. 963 (1907).

The right may be acquired by trespassers upon public land. Patterson v. Ryan (Utah), 108 Pac. 1118 (1910).

A right by actual appropriation may be acquired by a trespasser upon unsurveyed government land. Patterson v. Ryan (Utah), 108 Pac. 1118 (1910).

The right of appropriation may be acquired by a trespasser, and this right may become superior to that of the real owner. Patterson v. Ryan (Utah), 108 Pac. 1118 (1910).

V. Miners.

Miners upon lands not riparian may appropriate water for the use of their mines. Krall v. United States, 79 Fed.

small garden, had no right or title, present or prospective, to the land. If a party seeks to claim water for irrigating agricultural land by appropriation, he must own the land sought to be irrigated, or be an actual, bona fide settler having a possessory interest. There must be evidence of an intent to acquire title. The right of a squatter or speculator to claim the right of appropriation has not been recognized by custom or sanctioned by statute. That Crosby did not sustain any bona fide relation to the land is sufficiently evidenced by the fact that although the land was surveyed and open to entry, he carried Rice's relinquishment to the government for nearly two years without filing it or making any entry on his own behalf. A mere squatter can claim no right either as an appropriator or a riparian proprietor. Kendall v. Joyce, 48 Wash. 489, 93 Pac. 1091; Kinney, Water & Water Rights, § 286; Alta Land Co. v. Hancock, 85 Cal. 219, 24 Pac. 645, 20 Am. St. Rep. 217; Smith v. Logan, 18 Nev. 149, 1 Pac. 678. It follows that respondents' title to the waters of Antoine Creek must date from the time of their entry in 1904, at which time they were subject to the prior appropriation of the appellants who, as the evidence shows, will probably need the entire flow in the dry season of the year.

241, 24 C. C. A. 543 (1897); Van Dyke v. Midnight Sun Mining & Ditch Co., 177 Fed. 85 (1910).

Owning a placer gold mine on land riparian to a stream is not an appropriation of the water thereof. An actual beneficial use is essential. Snyder v. Colorado Gold Dredging Co., 181 Fed. 62 (1910).

VI. Filling Fish Ponds.

The filling of reservoirs or artificial lakes for the propagation of fish is not a beneficial use. Windsor Reservoir & Canal Co. v. Lake Supply Ditch Co., 44 Colo. 214, 98 Pac. 729 (1908).

The waters of a stream may be diverted for purposes of fish ponds if they are allowed to run back again unpolluted. State v. Barker (Idaho), 108 Pac. (1910.).

VII. Power for Electricity.

Power for operating an electrical plant is a beneficial use. Thompson Co. v. Pennabaker, 173 Fed. 849, 97 C. C. A. 591 (1909).

VIII. Speculators.

A speculator with no intention to apply the water to any beneficial use acquires no rights by posting of notice. Miocene Ditch Co. v. Champion Mine & Trading Co., 3 Alaska 572 (1908).

No one can make a valid appropriation for the purposes of speculation only. Weaver v. Eureka Lake Co., 15 Cal. 271 (1860).

An appropriation cannot be made for speculative purposes. Toohey v. Campbell, 24 Mont. 13, 60 Pac. 396 (1900).

An appropriation cannot be made for the purpose of securing a monopoly and preventing beneficial use by others. Hewett v. Story, 64 Fed. 510, 12 C. C. A. 250, 29 U. S. App. 155, 30 L. R. A. 265 (1895); Nevada County & Sacramento Canal Co. v. Kidd, 37 Cal. 282 (1869); Hayne v. Nephi Irrigation Co., 16 Utah 421, 52 Pac. 765, 67 Am. St. Rep. 623, 41 L. R. A. 311 (1898).

IX. Corporations.

A corporation formed to divert and carry water, but possessing no land to

The case falls squarely within the rule of Longmire v. Smith, 26 Wash. 439, 67 Pac. 246, 58 L. R. A. 308, rather than Benton v. Johncox, 17 Wash. 277, 49 Pac. 495, 39 L. R. A. 107, 61 Am. St. Rep. 912, and Nesalhous v. Walker, 45 Wash. 621, 88 Pac. 1032, as is contended by respondents. The latter cases define the rights of parties riparian to a stream to use water for irrigation as an incident to their riparian right, and do not apply unless the rights of all parties are equal and dependent upon riparian right. In the case at bar the waters of Antoine Creek were appropriated and being used at the time respondents settled and filed on their land, and were not subject to a riparian right to use the waters for irrigation, as against the first appropriator, who has perfected his title and was with reasonable diligence extending the area of cultivation on his lands riparian to the stream. "It is an elementary principle of the law of appropriation of water for irrigation that the first appropriator is entitled to the quantity of water appropriated by him, to the exclusion of subsequent claimants by appropriation or riparian ownership." Longmire v. Smith, *supra*.

It is unfortunate that the flood waters of Antoine Creek cannot be conserved for the use of all, but so long as our laws measure the rights of the appropriator of water by the necessities of the dry season, the

which it could be applied, is not an appropriator. Gould v. Maricopa Canal Co., 8 Ariz. 429, 76 Pac. 1125 (1904).

X. Aliens.

Appropriation may be made by an alien. Santa Paula Water Works v. Peralta, 113 Cal. 38, 45 Pac. 68 (1896); Quigley v. Birdseye, 11 Mont. 439, 28 Pac. 741 (1892).

XI. Successor in Interest.

The successor in interest of one who has commenced the work necessary to the appropriation of a water right may complete it. Nevada Ditch Co. v. Bennett, 30 Or. 59, 45 Pac. 472, 60 Am. St. Rep. 777 (1896).

XII. Personal Use Not Necessary.

Sale or rental to others who will put to a useful purpose is a sufficient beneficial use. Farmer's Co-Operative Ditch Co. v. Riverside Irrigation District, 14 Idaho 450, 94 Pac. 761 (1908).

It is not necessary that the appropriator make use of the water personally or use it upon his own land. Nevada Ditch Co. v. Bennett, 30 Or. 59, 45 Pac. 472, 60 Am. St. Rep. 777 (1896).

Use may be by others than the appropriator and on lands not owned by him. Hough v. Porter, 51 Or. 318, 98 Pac. 1083, 95 Pac. 732, 102 Pac. 728 (1909).

As to the time of the commencement of the right under appropriation, see note to Wishon v. Globe Light & Power Co., p. ——, vol. 2, this series.

As to the appropriation being limited to the beneficial use made of the water, see note to Porter v. Pettingill, p. ——, vol. 3, this series.

As to application of the water to a beneficial use being essential to a complete appropriation, see part III note to Drach v. Isola, p. ——, vol. 2, this series.

As to diligence in completing appropriation being required, see note to Drach v. Isola, p. ——, vol. 2, this series.

first in time must be held to be the first in right. The just purpose of the trial judge to apportion the waters cannot be sustained in the light of the evidence showing that there is no excess of water running to, or waste by, the appellants.

This cause is remanded with instructions to enter a decree fixing the amount of water actually necessary to irrigate the lands of appellants even to the full flow of the stream in the dry season; leaving the residue, if any, subject to the riparian right of respondent.

RUDKIN, C. J., and FULLERTON, GOSE, and MORRIS, JJ., concur.

MURRAY v. WHITE et al.

[Supreme Court of Montana, January 16, 1911.]

— Mont. —, 113 Pac. 754.

1. Placer Claim—Quantity of Metal.

No specific yield is necessary to constitute a placer nor is it required that the deposits of mineral shall be sufficiently extensive to pay operating expenses in order to maintain a valid placer claim.

2. Same—Discovery.

The finding of precious metals in quantity which justifies the expenditure of time and money with the reasonable hope of reward is sufficient to constitute a discovery.

3. Contracts—Fraud.

One alleging fraudulent concealment in a contract, has the burden of showing that the fact concealed was material and that but for the concealment he would not have entered into the agreement.

4. Same—Consideration.

Evidence of discovery held sufficient to constitute the relinquishment of a placer claim a sufficient consideration for a contract.

5. Same—Illegality.

A contract whereby one claimant agrees to procure a patent to certain land for the use of another in order to defeat a prior grant by that other, is not illegal nor against public policy.

6. Same—Construction.

A contract whereby one party agrees to pay one-half the expense of securing a patent to land held not to cover one-half of a contingent fee of $8,000 to the attorney assisting in procuring the patent.

7. Public Domain—Mineral and Agricultural Entries.

A compromise between one asserting title under a mineral location and another claiming under an agricultural entry, whereby each received a part under his application, is not illegal or fraudulent.

8. Same—Entry for Another.

A contract by one making entry by virtue of soldier's additional scrip, whereby he agrees to make entry for the use of another, is not against public policy where it does not appear that the usee was not qualified to take patent in his own name.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

Suit for specific performance by James A. Murray against Robeson T. White and another. Decree for the plaintiff. Defendants appeal. Affirmed.

For appellants—Kirk, Bourquin & Kirk and W. T. Pigott.

NOTE.

As to necessity for and effect of discovery of mineral on mining location, see note to Charlton v. Kelly, *ante*, p. 293.

For respondent—Roote & Murray.

HOLLOWAY, J. This suit was brought by Murray to enforce the specific performance of a contract to convey real estate. From a decree in favor of plaintiff and from an order denying them a new trial the defendants have appealed.

In his complaint the plaintiff alleges that in July, 1898, he and the defendant White each had an application before the Land Department of the United States, to enter the S. ½ S. E. ¼, and S. E. ¼ S. W. ¼ of section 17, township 3 N., range 7 W., in Silver Bow County; that the parties were claiming the land adversely, and, for the purpose of effecting a compromise and facilitating the issuance of patent, they entered into a contract by the terms of which Murray agreed to relinquish his claim to the S. E. ¼ S. W. ¼, hereinafter called the west forty, and the S. W. ¼ S. E. ¼, hereinafter called the middle forty, and not hinder or obstruct the issuance of patent therefor to White; and White agreed to relinquish his claim to the S. E. ¼ S. E. ¼, hereinafter called the east forty, and not thereafter hinder Murray in securing patent to that portion of the land; that White further agreed to procure the right to make, and make, a soldier's additional homestead entry, or other scrip entry, upon the west and middle forties, procure patent therefor, and, as soon as patent should be issued, transfer the middle forty to Murray, upon Murray's paying one-half the expense of such patent proceedings. It is then alleged that pursuant to the agreement the respective relinquishments were made; that White procured patent to the west and middle forties; that Murray paid a part of the expense and offered to pay the balance, if any, of the one-half of such expense, and has otherwise performed his part of the agreement, but that White refuses to render any account of the expense of procuring patent, and refuses to convey the middle forty as he agreed to do. It is alleged that defendant Lloyd claims some interest in the land in controversy, but that any claim which he may have was acquired subsequently to the date of the agreement between Murray and White, and with full knowledge of Murray's rights. A copy of the agreement is attached to, and made a part of, the complaint. The answer of the defendant Lloyd alleges that his only claim to the land is subordinate to the claim of White, and depends for its validity upon a successful defense by White. The answer of the defendant White does not deny any allegation of the complaint, but contains four separate affirmative defenses. The material allegations of these defenses were denied in a reply. Upon the trial the defendants assumed the burden of proof. The trial court found against them as to every one of their defenses, and the contention now is that the evidence preponderates against the findings made.

First Defense. It is alleged that the contract was procured by fraud, misrepresentation, and unfair practices on the part of Murray, in this: That all the lands were agricultural lands of the United States; that White had a bona fide application before the United States Land Department to enter such lands under the homestead laws; that Murray claimed that all of the lands contained valuable deposits of placer gold, and was claiming them under a pretended location thereof as a placer mining claim, whereas, in truth and in fact, said lands did not contain any deposits of placer gold and were nonmineral in character, all of which facts were well known to Murray but unknown to White; that in fact Murray did not have any claim to the lands; had prior thereto relinquished his pretended claim to the east forty altogether, and permitted others to locate the same; that, for the purpose of deceiving White and inducing him to enter into the contract in question, Murray misrepresented the character of his pretended claim to the west and middle forties, and concealed from White the fact that he had no claim whatever to the east forty; that Murray represented that he had a good and valid placer location upon the lands and would contest and litigate with White for the lands; that, relying on, and believing in, Murray's representations as to the character of his claim, and to avoid the threatened litigation, and not otherwise, White entered into the agreement.

(a) Appellants attack Murray's placer location as being fraudulent. They insist that the evidence shows that Murray knew that the ground was nonmineral in character, and that his representation to White that he had a valid placer location was false, and made with intent to deceive White and induce him to enter into the contract. It is true that the evidence as to the presence of minerals in the ground is very slight, and that Murray had maintained his location for several years without developing a paying placer, and without demonstrating that the ground was in fact valuable for the minerals it contained. But there is some evidence that placer gold had been discovered in the ground, the surface of which is decomposed granite and other rock washed down from the nearby mountains. All the other portions of section 17 have been patented as placer locations. The ground is situated near the great quartz mines of Butte, and along the same stream, and not far from producing placers. The general character of the soil and the location of the ground are such as to indicate the presence of placer gold. Witnesses expressed the opinion that the ground could be mined profitably by dredging. Under these circumstances we do not think that it can be said that the evidence shows such a degree of poverty in the placer claim that Murray's assertion of that claim should be held to be fraudulent. Neither the federal nor state statutes require that, to constitute a placer, the ground

shall yield any specific quantity of precious metals. Neither is it required that the deposits of mineral shall be sufficiently extensive to pay operating expenses, in order to locate and maintain a valid placer claim.

It has long been the settled rule that to constitute a discovery within the meaning of that term as used in mining law, it is sufficient that precious metals be found in the ground in quantity which justifies the locator in spending his time and money in prosecuting development work, with the reasonable hope or expectation of finding mineral in payment quantities. Harrington v. Chambers, 3 Utah 94 1 Pac. 362; Book v. Mining Co. (C. C.), 58 Fed. 106; Nevada Sierra Oil Co. v. Home Oil Co. (C. C.), 98 Fed. 676; 27 Cyc. 556; Snyder on Mines, §§ 349, 360; Shreve v. Copper Bell M. Co., 11 Mont. 309, 28 Pac. 315; McShane v. Kenkle, 18 Mont. 208, 44 Pac. 979, 33 L. R. A. 851, 56 Am. St. Rep. 579; Noyes v. Clifford, 37 Mont. 138, 94 Pac. 842. The precious metals are not evenly distributed throughout veins or placer ground. A claim may be barren in one part, poor in another, rich in another, and withal very valuable as a whole, so that the failure of the locator to develop a paying property within any given time is not conclusive against the validity of his claim. It is a part of the history of this mining region that, even in the case of a placer claim, much time and labor must be expended and considerable expense incurred in developing a paying claim, when bed rock is covered with great quantities of debris, as is the case in the present instance. The evidence shows that Murray is a man of experience in mining operations, and that he evidenced his faith in the validity of his claim by the expenditure of considerable money in sinking shafts in attempts to reach bed rock, where he expected to find placer gold. Furthermore, White had an equal opportunity with Murray to examine the soil, determine its character, and decide for himself whether Murray's contention that the land was mineral in character had any foundation in fact. While there are facts and circumstances which tend to discredit Murray's claim, we are not satisfied that the evidence preponderates against the trial court's finding.

(b) It is further insisted that Murray perpetrated a fraud on White in concealing the fact that he had already relinquished his claim to the east forty. The defendants, having the burden of proof, were compelled to show (1) that the fact concealed was a material one, and (2) that but for the concealment, White would not have entered into the agreement. White testified that some time in the early part of 1898, before the contract with Murray was entered into, he discovered that the east forty contained brick clay; that he called this fact to the attention of his attorney, and was advised that the Land Department might hold that forty subject to mineral entry, and because of this advice he did not attach so much

value to his homestead application for that forty; that he was of the opinion that the Land Department had classified the middle and west forties as agricultural land; that he knew the east forty was clay placer, and that he had little hope of success in contesting with Murray. Furthermore, White testified that his negotations with Murray commenced in May or June, 1898; that Murray then asserted his claim, and that he could secure proof necessary to procure patent as a placer; that at their first meeting Murray suggested the terms of the compromise, and he agreed to them; that he knew in a general way that the surrounding lands had been taken up as mineral claims, and that he signed a relinquishment to the east forty, in which he stated that it was mineral land.

It is somewhat singular that, while evidence was given by defendants as to the value of the west and middle forties, there was not any given as to the value of the east forty at the time the agreement between White and Murray was entered into, and we are unable to know what, if any, value White attached to his homestead entry at that time, so far as it related to the east forty; while the evidence given by plaintiff is that the land was practically valueless for agricultural purposes. At the time the agreement was entered into, the only claim made by White to any of the land was based upon his application to enter it under the homestead laws, and his own cross-examination tends strongly to cast suspicion upon the *bona fides* of that claim.

While the evidence is not very definite, we think it fairly inferable that the terms of the contract were actually agreed upon before Murray relinquished his claim to the east forty, even though the terms had not been reduced to writing, and, if this is so, it was wholly immaterial to White what disposition Murray made of his claim to that parcel of land, and inconceivable that Murray's subsequent concealment of the fact that he had relinquished his claim could prejudice White. Viewed in any light, we think that the defendants failed to maintain the burden cast upon them of showing that Murray's concealment of the fact of his relinquishment at the time the contract was executed misled White to his prejudice; or, speaking more accurately, the evidence does not preponderate against the trial court's finding upon this question.

Second Defense. This defense is based upon a want of or inadequate consideration. It is alleged that the agreement on the part of Murray to defray one-half the expenses of procuring patent to the middle and west forties was wholly fictitious; that Murray did not have any valid claim to any of the land, and was therefore not foregoing any advantage or surrendering any right in relinquishing his pretended claim to those two forties; that, at the time the contract was made, the land was of the value of $200 per acre; that defendant White had the preference right to

enter all three forties, by virtue of his successful contest with one McCrimmon, a former claimant. It is unnecessary to revert again to the evidence touching the character of White's homestead or Murray's placer claim. Under a charitable view we think it can be said that each had a claim, which he was asserting to the entire three forties, and this being so, Murray's relinquishment of his claim to the west forty was a valid and sufficient consideration for this contract. Tessendorf v. Lasater, 10 Kan. App. 19, 61 Pac. 677; Hardesty v. Service, 45 Kan. 614, 26 Pac. 29; Waring v. Loomis, 35 Wash. 85, 76 Pac. 510; McCabe v. Caner, 68 Mich. 182, 35 N. W. 901.

The third defense is that the consideration for the contract was illegal. It is alleged that some time prior to the execution of the contract Murray had granted a right of way over the middle forty to a street railway company; that when Murray and White reached an agreement for a division of this land, White insisted that he should procure patent to the west forty independently of Murray, and leave Murray to procure patent to the middle and east forties; that Murray refused to agree to this arrangement but insisted that White secure patent to the middle forty for the use of Murray, to the end that Murray might coerce the street railway company into paying again for the right of way, and thereby cheat and defraud the railway company, and because of Murray's insistence upon this term, and not otherwise, White entered into the agreement as made. The contract, a copy of which is attached to the complaint, does not contain anything suggestive of illegality; and White protests his innocence of any active participation in the fraud which he claims Murray desired to perpetrate. Under the allegations of the complaint, it is not just clear how Murray could carry into effect his design. White was not bound by the contract to aid Murray in any way. His obligation extended only to securing patent and transferring the middle forty to Murray.

There is not any principle of law better settled than that a party to an illegal contract cannot come into a court of equity and have the illegal object carried into effect; but this suit does not have any such purpose. The contract obligates White to deed the land to Murray personally. If the performance of the contract is enforced, White and Murray will each have received just what he agreed he should receive, and no fraud will have been perpetrated on any one. Does it lie in the mouth of White to say, then, that, although the contract was fair and just as between him and Murray, still it ought not to be enforced, because at the time of its execution Murray cherished the hope that he might be able to defraud the street railway company by virtue of the terms of the contract? We think not.

Counsel for appellants have not called our attention to any decided case similar in its facts to the case before us, and neither have we found any. As nearly an analogous case as we can find is made out by these facts: A., a resident of this state, loans money to B., who gives a mortgage upon land situated in this state as security for the loan; but at A.'s request the mortgage and note are made to run to C., who is a nonresident, and this is done for the purpose of defrauding the state out of the taxes upon the mortgage. A. takes an assignment from C. of the note and mortgage, but does not place the assignment on record until foreclosure is sought. Upon B.'s default, A. commences foreclosure proceedings and B. defends upon the ground that the contract was and is void as against public policy. Upon these facts the Nevada and Kansas courts have refused to foreclose the mortgage. Drexler v. Tyrrell, 15 Nev. 114; Sheldon v. Pruessner, 2 Kan. 79, 35 Pac. 201, 22 L. R. A. 709. But the decided weight of authority is against the holding of these courts. Crowns v. Forest Land Co., 99 Wis. 103, 74 N. W. 546; Nichols v. Weed Sewing Machine Co., 27 Hun 200, S. C. 97 N. Y. 650; Callicott v. Allen, 31 Ind. App. 561, 67 N. E. 196; Jones on Mortgages, § 619, and note; Stilwell v. Corwin, 55 Ind. 433, 23 Am. Rep. 672. We think the rule is quite well settled that courts will not hold a contract void as against public policy, unless the contract itself requires that something be done which adversely affects the public welfare, or is forbidden by law, or the consideration is illegal or immoral. Callicott v. Allen, above. In Lawson v. Cobban, 38 Mont. 138, 99 Pac. 128, this court said: "Courts are reluctant to declare a contract void as against public policy, and will refuse to do so if, by any reasonable construction the contract can be upheld." This contract is not of itself illegal or immoral. The consideration for it was the compromise of the conflicting claims of Murray and White. We do not think that it can be said that it falls within the class of contracts the enforcement of which is denied on the ground of public policy.

Fourth Defense. (a) The fourth defense is based upon the proposition that, since Murray had a mineral application for all these forties, and White had an agricultural application for the same lands, there could not be a lawful compromise of their claims so that one could receive a part of the disputed ground under a mineral application, and the other the remaining portion under his agricultural application. In their brief counsel for appellants say: "The two claims were antagonistic to each other; one of them was fraudulent and illegal, based on false testimony, and was an attempt to defraud the Government of the United States." This premise is clearly erroneous, and the argument based upon it, of course, equally so. That one person in perfect good faith may assert a mineral application for a particular parcel of public land, and another

person, equally in good faith, may assert his agricultural application for the same ground, is beyond question. The same land may be valuable for both mineral and agricultural purposes. Its mineral value may be slight, and under such circumstances it is a question of fact whether it is mineral land within the meaning of the federal statute. Under such circumstances the controversy is settled by the Land Department, by determining whether the land is more valuable for the one purpose or the other. Washington v. McBride, 18 Land Dec. Dep. Int. 199; Sweeney v. Northern Pacific R. Co., 20 Land Dec. Dep. Int. 394; Walker v. Southern Pacific R. Co., 24 Land Dec. Dep. Int. 172.

It is conceded that, as between rival claimants for the same piece of public land, a compromise of their differences is recognized—even encouraged—by the government; but it is argued that, in every instance wherein reference was made to this well-known rule, both claimants were asserting rights under the same general character of entry. And it is insisted that a case cannot be found in which the government recognized the right of one claimant, who was asserting title under a mineral location, and his rival, who was asserting title under an agricultural entry, to compromise their differences, so that one could secure patent to a portion of the land under his mineral application, and the other the remaining portion under his agricultural entry; and this may be true, but the fact, if it is a fact, that such a case has not been determined can scarcely be considered evidence that such a compromise would not be recognized by the federal authorities, if a case presenting it did arise. We do not see any difference in principle between a case of this kind and one involving a controversy between rival claimants under the same character of entry. Of course, title to known mineral land cannot be secured under agricultural entry (section 2318, Rev. St. U. S. [page 1423, U. S. Comp. St. 1901]), and any effort on the part of rival claimants to secure such a result would be defeated as an attempted fraud on the government; but where, as in the case before us, the land has little value for either purpose, and there is a bona fide contest involved as to the particular use for which the land has the greater value, we do not see any objection which the government could interpose against an amicable settlement of the difficulty by a division of the land between the rival claimants. Certainly there was not anything done by these parties which precluded the government from making an investigation of the land to determine its character.

(b) Again, appellants say: "A secret agreement by one to secure in his own name title to public land for the use and benefit of another, and to then convey to that other, is against public policy, illegal and unenforceable." Stated thus broadly, the premise is not true. It is

only true when the contract deals with a character of entry with respect to which the statutes of the United States prohibit such a contract. Lamb v. Davenport, 18 Wall. 307, 21 L. Ed. 759; Barnes v. Poirier, 64 Fed. 14, 12 C. C. A. 9; Webster v. Luther, 163 U. S. 331, 16 Sup. Ct. 963, 41 L. Ed. 179. Pursuant to the agreement under consideration, White made his entry and procured patent to the middle and west forties by virtue of a soldier's additional homestead scrip. A contract by the entry man under such scrip entry, to convey title to a portion of the land when patent issues, does not contravene any public policy, is not prohibited by law, and will be enforced. Webster v. Luther, *supra;* Barnes v. Poirier, *supra;* Tecumseh State Bank v. Maddox, 4 Okla. 583, 46 Pac. 563; Waring v. Loomis, *supra;* Hardesty v. Service, *supra.* In Keely v. Gregg, 33 Mont. 216, 82 Pac. 27, 83 Pac. 222, this court expressed the opinion that a contract of the character of the one now before us is invalid. The question was not before the court, and the opinion expressed was *dictum.* However, on rehearing (33 Mont. 227, 82 Pac. 27, 83 Pac. 222) the court withdrew its remarks and left the question open.

(c) But it is insisted that the enforcement of a contract of this character makes possible the evasion of the federal statute, by permitting one who is not himself a qualified entry man to secure title to government land by the indirect method of having patent issued to one who is a qualified entry man, but who secures the patent under contract to convey the land to the former. Without deciding the question, we may agree with counsel that, if it appeared that Murray was not qualified for any reason to secure patent to the middle forty as agricultural land, then this contract by which White agreed to secure it for him is not enforceable; but there is not any presumption that a contract is fraudulent and void. Defendants, having the burden, were required to allege and prove that Murray was not qualified to take patent to the middle forty as agricultural land, and, having failed to make such allegation or proof, they failed to sustain this contention. The case of Kreamer v. Earl, 91 Cal. 112, 27 Pac. 735, cited by counsel for appellants, is not inconsistent with this theory, for there it appeared affirmatively that the contract involved provided for securing to one person a quantity of public land in excess of the amount allowed under the statute.

Finally, it is urged that the trial court erred in fixing the amount which Murray should pay to White as a condition to White's transferring the middle forty. The contract provides that Murray shall pay to White one-half of the expense incurred by White in securing patent to the west and middle forties. It appears that at the time the contract was entered into the land was involved in a contest between the McCrimmon and White applications; that it was neccessary for White to have the services

of an attorney to aid him in procuring patent, and that he arranged with his attorney to perform the necessary services upon a contingent fee of one-third the value of the west forty. Appellants now contend that, since the west forty was shown to have a value of $50,000 for town-site purposes, and one-third of this value inures to the benefit of the attorney, Murray should pay one-half of that fee, or $8,333.33. However conclusive the agreement between White and his attorney may be upon the parties to it, Murray, who was not a party, cannot be bound. From the very nature of the case, it was impossible for Murray and White to anticipate the exact amount of expense which would be incurred in securing patent, but, in the absence of a fixed amount, Murray's contract to pay one-half of the expense must be held to mean one-half of the reasonable expense, and not one-half of such expense as White might arbitrarily incur. 1 Page on Contracts, §§ 27, 28. This was the view entertained by the trial court, and upon this basis the court ordered Murray to pay to White $1,130.

We do not find that any reversible errors were committed. The judgment and order are affirmed.

Affirmed.

BRANTLY and SMITH, JJ., concur.

BANNAN v. GRAEFF et al.

[Supreme Court of Pennsylvania, July 21, 1898.]

186 Pa. St. 648, 40 Atl. 805.

1. Mining Lease—Exhaustion of Mineral.

Lessee will not be required to pay the minimum royalty under a lease providing for production of a certain amount of coal "unless prevented from doing so by any unavoidable accident or occurrences beyond their control" where the coal has become exhausted.

Action to recover rent or royalty under mining lease. Judgment for defendants. Affirmed.

CASE NOTE.

Effect of the Nonexistence or Exhaustion of the Mineral on Gas or Oil Leases.

I. The General Rule.

Mining leases commonly include, in addition to the usual undertaking to pay for what may be actually mined, a covenant that some fixed or ascertainable sum, at least, shall be annually paid. These covenants run all the same or to the same effect. They may be divided into two classes: (1) Those which require the payment of rent irrespective of products, (2) those which require that upon failure to take out a stipulated quantity, royalty with respect thereto shall nevertheless be paid. Where the covenant is of the first class, the tenant is liable for the rent, even if nothing could be got by mining. Where the covenant is of the second class, his obligation is to pay for the stipulated quantity whether mined or not, not whether it exists or not. He contracts for promptitude and thoroughness, not for the productiveness of the mine. Ridgely v. Conewago Oil Co., 53 Fed. 988 (1893).

Mining leases ccontaining a covenant for the payment of a minimum rent or royalty may be divided into two general classes: (1) Those which require its payment as a dead rent, irrespective of products, and (2) those which require the mining of a stipulated amount of ore, or upon failure to do so, payment of the royalty upon it. Where the covenant is of the first class, the lessee is liable to pay this minimum royalty as he would rent, even if no ore existed. Where the covenant is of the second class it has been construed generally as an obligation to pay for the stipulated amount of ore, whether mined or not—not whether it existed or not—that is that the lessee contracts for diligence

For appellant—George M. Roads.

For appellees—John W. Ryon.

GREEN, J. There was no absolute obligation in the lease in question to pay a fixed royalty or rental throughout the whole period of the term, as there was in Timlin v. Brown, 158 Pa. St. 606, 28 Atl. 236, and therefore the liability of the lessees must be measured by the ordinary reading of the terms of the contract. The sixth clause of the lease provides that the lessees shall mine and ship each year as much coal as

and promptitude in mining but not for the productiveness of the mine. Diamond Iron Min. Co. v, Buckeye Iron Min. Co., 70 Minn. 500, 19 Mor. Min. Rep. 197, 73 N. W. 507 (1897).

Failure to surrender under lease providing for prospecting for ore and that if not surrendered by a certain day it be deemed ore was found, is not conclusive, but casts upon the lessee burden of proving no ore existed. McCahan v. Wharton, 121 Pa. St. 424, 16 Mor. Min. Rep. 239, 15 Atl. 615 (1888).

Where lease provides for drilling at least two wells, lessee cannot abandon the same after drilling one well which proved unproductive. Ahrns v. The Chartiers Valley Gas Co., 188 Pa. St. 249, 19 Mor. Min. Rep. 584, 41 Atl. 739 (1898).

In order to sustain action for damages by lessor against lessee for failure to sink well and develop property, it must be shown that oil or gas existed on the premises. Duff v. Bailey, 29 Ky. L. Rep. 919, 96 S. W. 577 (1906).

Where money is paid under lease which presupposed existence of mineral which was thereafter found not to exist, it cannot be recovered back; having been paid to prevent the forfeiture of the lease. Bloomfield Coal & Min. Co. v. Tidrick, 99 Iowa 83, 68 N. W. 570 (1896).

II. The Existence of the Mineral Is Presumed.

In mining, oil or gas lease upon a royalty there is an implied covenant the mineral contemplated does in fact exist in the land.

England.—Lord Clifford v. Watts, L. R. 5 C. P. 577 (1870); Gowan v. Christie, L. R. 2 H. L. (Sc.) 273, 5 Moak 114, 8 Mor. Min. Rep. 688 (1873); Jones v. Shears, 7 C. & P. 346, 32 Eng. C. L. 649, 8 Mor. Min. Rep. 333 (1836).

Alabama.—Brooks v. Cook, 135 Ala. 219, 22 Mor. Min. Rep. 456, 34 So. 960 (1902).

Colorado.—Colorado Fuel & Iron Co. v. Pryor, 25 Colo. 540, 19 Mor. Min. Rep. 544, 57 Pac. 51 (1898); Caley v. Portland, 18 Colo. App. 390, 22 Mor. Min. Rep. 595, 71 Pac. 891 (1903).

Florida.—Hiller v. Walter Ray & Co. (Fla.), 52 So. 623 (1910).

Illinois.—Walker v. Tucker, 70 Ill. 527, 8 Mor. Min. Rep. 672 (1873).

Iowa.—Reed v. Beck, 66 Iowa 21, 23 N. W. 159 (1885); Fritzler v. Robinson, 70 Iowa 500, 17 Mor. Min. Rep. 105, 31 N. W. 61 (1886); Bloomfield Coal & Min. Co. v. Tidrick, 99 Iowa 83, 68 N. W. 570 (1896).

Kentucky.—Given's Executors v. Providence Coal Co., 22 Ky. Law R. 1217, 60 S. W. 304 (1901); Duff v. Bailey, 29 Ky. L. Rep. 919, 96 S. W. 577 (1906).

Michigan.—Gribben v. Atkinson, 64 Mich. 651, 15 Mor. Min. Rep. 428, 31 N. W. 570 (1887); Blake v. Lobb's Estate, 110 Mich. 608, 18 Mor. Min. Rep. 462, 68 N. W. 427 (1896).

Ohio.—Cook v. Andrews, 36 Ohio St. 174, 3 Mor. Min. Rep. 171 (1880); Brick Company v. Pond, 38 Ohio St. 65 (1882).

will produce $5,000 yearly at the rents designated, "unless prevented from doing so by any unavoidable accident or occurrences beyond their control." If, therefore, the coal on the premises became exhausted before the end of the term, this would be an occurrence beyond their control, which would absolutely prevent them from taking out the quantity necessary to make up the annual rental of $5,000. The affidavit of defense positively avers that the lessees "mined out all the coal from the Joseph Keffer and all of the Lykens Valley measures in the Nancy Kinnear, so that no available or workable coal was left in either of said tracts in the veins referred to; that many of the veins were faulty, and

Pennsylania.—Kemble Iron Co. v. Scott, 15 W. N. C. (Pa.) 220 (1884); Muhlenberg v. Henning, 116 Pac. St. 138, 15 Mor. Min. Rep. 423, 9 Atl. 144 (1887); Garman v. Potts, 135 Pa. St. 506, 16 Mor. Min. Rep. 108, 19 Atl. 1071, 26 W. N. C. 305 (1890), and see cases cited in VII, *post*.

Lease for the purpose of exploring for, mining, taking out and removing therefrom the merchantable iron ore which is or which hereafter may be found on, in or under said land at a fixed rental, presupposes the existence of ore and upon it appearing that no such ore was to be found, the purpose of the lease is gone and the lessees should not be changed with the consideration. Gribben v. Atkinson, 64 Mich. 651, 15 Mor. Min. Rep. 428, 31 N. W. 570 (1887); Blake v. Lobb's Estate, 110 Mich. 608, 18 Mor. Min. Rep. 462, 68 N. W. 427, 3 Detroit L. N. 510 (1896).

Mining lease granting right to all mineral in certain lands for a certain length of time, the lessees binding themselves to produce a certain amount and pay royalty thereon, contains an implied covenant that the mineral exists, and if it be found not to exist, the lessee will not be held liable for the royalty. Brooks v. Cook, 135 Ala. 219, 22 Mor. Min. Rep. 456, 34 So. 960 (1902).

A total failure of consideration from mutual mistake occurs where both parties believing ore to exist enter into a lease and it is then found none exists. In such case relief may be had in equity. Fritzler v. Robinson, 70 Iowa 500, 17 Mor. Min. Rep. 105, 31 N. W. 61 (1886).

Where the covenant is "to mine or pay for two thousand tons per year" it is no defense to an action thereon that sufficient ore to produce that amount did not exist in the land. Where the existence of the ore was at the time of the execution of the lease on both sides regarded as problematical, the lessee runs the risk of finding the ore and is bound by his agreement to pay the designated rent. Wharton v. Stoutenburgh, 46 N. J. L. 151 (1884).

III. No Particular Amount Presumed.

No covenant of any particular productive capacity is implied in the lease of an oil well. Clark v. Babcock, 23 Mich. 164, 8 Mor. Min. Rep. 599 (1871).

Lease of certain property including "six salt wells, tools, and fixtures for the same" does not imply covenant on the part of the lessor that there are on said premises six salt wells of any particular productive capacity or suitable for the purposes for which they are leased. Clifton v. Montayia, 40 W. Va. 207, 21 S. E. 858, 52 Am. St. Rep. 872, 33 L. R. A. 449 (1895).

IV. Burden of Proof.

In a lease of land for mining purposes the failure to find the specified mineral and the character of the search made for it, being more within the knowledge of the lessees, are matters of defense in

large sums of money were expended in cutting through the faults, and in driving tunnels, and in prosecuting their investigation in the veins aforesaid, until all the coal was mined out and shipped away and paid for by the lessees." The affidavit further alleges "that during the time they worked and mined coal in said lands they paid an annual rental of more than $5,000, and they continued such annual payments until the coal as aforesaid was exhausted; and they therefore deny that there is anything due and payable on account of said lease to the said Francis B. Bannan, or any other person or persons." These averments are, of course, to be taken as verity; and, if they are true, the lessees have

an action for royalties. Hiller v. Walter Ray & Co. (Fla.), 52 So. 623 (1910); Cook v. Andrew, 36 Ohio St. 174, 3 Mor. Min. Rep. 171 (1880); McCahan v. Wharton, 121 Pa. St. 424, 16 Mor. Min. Rep. 239, 15 Atl. 615 (1888).

V. Absolute Covenant to Pay.

Where the covenant is to pay a certain fixed amount annually, or to get out a certain fixed amount annually the lessee is liable on his covenant notwithstanding the fact that the mine has become exhausted. Marquis of Bute v. Thompson, 13 M. & W. 487, 8 Mor. Min. Rep. 371 (1844); McDowell v. Hendrix, 67 Ind. 513, 9 Mor. Min. Rep. 96 (1879); Phillips v. Jones, 9 Sim. 519, 8 Mor. Min. Rep. 344 (1839); Jervis v. Tomkinson, 1 H. & N. 195 (1856).

The failure to find the mineral will not defeat the lessee's positive covenant to pay rent. Rex v. The Inhabitants of Redworth, 8 East 387 (1807); Jowett v. Spencer, 1 Exch. 647, 17 L. J. Exch. 367, 2 Mor. Min. Rep. 499 (1847).

Where the lease is taken at a certain dead rent, the lessee is bound to pay it whether he works the mine or not. Jegon v. Vivian, L. R. 6 Ch. 742, 40 L. J. Ch. 389, 8 Mor. Min. Rep. 628 (1871).

Under contract or lease of a colliery which has become not worth working, equity will relieve from payment of royalty upon lessee paying for the remaining coal. Smith v. Morris, 2 Bro. Ch. 311, 8 Mor. Min. Rep. 317 (1788).

In the lease of a mine where lessee agreed to pay a certain royalty upon its products, there was a further provission that "in case the royalty due and payable to the parties of the first part according to the above rates, shall in any year fall below the sum of one thousand dollars, then the parties of the second part shall pay to the parties of the first part such additional sum of money as shall make the royalty for such year amount to the sum of one thousand dollars, which sum shall be held and taken to be the royalty for that year, provided always that if sufficient ores cannot be found to allow said minimum payment and if said party of the second part shall in consequencce thereof fail to pay said minimum sum of one thousand dollars yearly, then said party of the second part shall, if required by said parties of the first part, relinquish this lease and the privileges hereby granted, and the same shall cease thereupon." In construing this lease the court say: "Looking at all the provisions of the lease, it is clear that the defendant engaged to pay as rent in each year the royalties fixed in the lease, and if in any year the royalties fall below the sum of one thousand dollars, it was to make up the deficit so that the latter sum should in any event be paid annually as rent. The defendant took the chance of a failure to find ore in sufficient quantities to justify working the mines, and the plaintiffs took the chance of not obtaining more than one thousand

paid all the money which they were required to pay under the terms of the contract. In Iron Co. v. Scott, 15 Wkly. Notes Cas. 220, the lessee covenanted to pay fifty cents per ton of ore mined, and that after the first year the rent should not be less than $10,000, whether ore to that extent was mined or not. The defendant offered to prove on the trial that the premises did not contain the necessary quantity of ore, fit for use in a furnace, to yield the amount of royalty to be paid, and we decided that this was a good defense. Gordon, J., delivering the opinion, said: "Hence the material question was, could the ore found in the leased premises, under the present methods of making iron, be prop-

dollars annually during the existence of the lease for the use of the buildings and fixtures that had cost them more than sixty thousand dollars. To secure the payment annually of at least one thousand dollars, the right was reserved to the plaintiffs to terminate the lease if the company failed in any year to pay that sum as rent, and that the company might get the advantage of any developments indicating that the leased premises were of substantial value, the exclusive privilege was reserved to it of purchasing them at any time while the lease remained in force. Lehigh Zinc & Iron Co. v. Bamford, 150 U. S. 665, 14 Sup. Ct. 219, 37 L. Ed. 1215 (1893), Bamford v. Lehigh Zinc & Iron Co., 33 Fed. 677 (1887).

Where a lease contains a covenant to pay a certain minimum rent absolutely the exhaustion of the mine is immaterial. Watson Coal & Min. Co. v. Casteel, 73 Ind. 296, 9 Mor. Min. Rep. 130 (1881).

Where parties having prospected certain ground take a lease thereon undertaking for a certain royalty, the maximum and minimum thereof being fixed, for the period of ten years, to mine the property, it amounts to a sale of the mineral in place, and the lessees are bound to pay the minimum rent although it may not be profitable to work the property after the end of the eighth year. The case is distinguished from one where parties dealing under a mutual mistake as to the existence of mineral at the time the lease was made afterwards ascertained that no mineral existed. Timlin v. Brown, 158 Pa. St. 606, 28 Atl. 236 (1893).

One who accepts an oil or gas lease with stipulation to pay a monthly rental until a well is completed or until the expiration of a certain fixed time, is bound to pay such rental although he does not within such term enter upon the land and complete such well, unless he was prevented from doing so by the lessor, and not by mere personal default. Lawson v. Kirchner, 50 W. Va. 344, 21 Mor. Min. Rep. 683, 40 S. E. 344 (1901).

It is undoubtedly competent for the lessee to bind himself absolutely to the payment of a stipulated amount without reference to the source from which he expected to derive the means of payment, and to agree that the obligation to pay should have all the virtue and characteristics of an agreement to pay rent. Lawson v. Williamson Coal & Coke Co., 61 W. Va. 669, 57 S. E. 258 (1907).

Where a lease contains an absolute covenant to pay a certain rent, and provision for terminating it upon exhaustion, the lessee is bound to pay until he terminates the lease although the mineral is in fact exhausted. Palmer v. Wallbridge, 15 Can. Sup. Ct. 650 (1888).

VI. Effect of Possession.

Under a lease containing provision "if no coal is found under said land and this lease is abandoned, then said payments are not to be made," the lessee is liable for the rent for so long as he

erly used for the purpose indicated? If it could be so used, and there was enough of it, the plaintiffs had a right to require the full performance of the contract. If, however, there proved to be a failure in either of these particulars, then was the defendant released from payment in whole or in part, as the case might be." In Muhlenberg v. Henning, 116 Pa. St. 138, 15 Mor. Min. Rep. 423, 9 Atl. 144, our late Brother Clark, in a very clear and exhaustive opinion, held that there was no liability on the part of the lessee to pay a fixed minimum royalty if there was no ore on the premises to mine, or if the ore that was there was not of the kind that was to be taken out under the contract. It was an

continues in possession of the property, notwithstanding no coal may have been found. McDowell v. Hendrix, 67 Ind. 513, 9 Mor. Min. Rep. 96 (1879); Lehigh, etc., Coal Co. v. Wright, 177 Pa. St. 387, 33 Atl. 919 (1896).

Under provision of a lease that lessee should pay fifty dollars a month for the privilege of mining and hoisting ore through a shaft, and also that lessee should produce a certain minimum quantity or pay a certain minimum royalty, he is liable for the fifty dollars a month if he continues to use the shaft, although the mineral has become exhausted. Lennox v. Vandalia Coal Co., 158 Mo. 473, 59 S. W. 242 (1900).

Under a lease giving right of possession and mining, with provision for termination thereof by lessee, the lessee is liable for rent so long as he continues in possession of the property, whether mineral exists or not. Clark v. Midland Blast Furnace Co., 21 Mo. App. 58 (1886); Lennox v. Vandalia Coal Co., 66 Mo. App. 560 (1896).

VII. Nonexistence or Exhaustion of Mineral a Defense to Action for Royalty.

The fact that no mineral existed in the land at the time the lease was made, or that it has become exhausted, is a good defense to an action for the royalty reserved.

England.—Lord Clifford v. Watts, L. R. 5 C. P. 577 (1870).

United States.—Ridgely v. Conewago Company, 53 Fed. 988 (1893).

Alabama.—Gaines v. Virginia & A. Coal Co., 124 Ala. 394, 20 Mor. Min. Rep. 393, 27 So. 477 (1900).

Colorado.—Colorado Fuel & Iron Co. v. Pryor, 25 Colo. 540, 19 Mor. Min. Rep. 544, 57 Pac. 51 (1898); Caley v. Portland, 18 Colo. App. 390, 22 Mor. Min. Rep. 595, 71 Pac. 891 (1903).

Florida.—Hiller v. Walter Ray & Co. (Fla.), 52 So. 623 (1910).

Indiana.—Indianapolis Gas. Co. v. Teters, 15 Ind. App. 475, 18 Mor. Min. Rep. 391, 44 N. E. 549 (1896); Moon v. Pittsburg Plate Glass Co., 24 Ind. App. 34, 56 N. E. 108 (1900).

Iowa.—Fritzler v. Robinson, 70 Iowa 500, 17 Mor. Min. Rep. 105, 31 N. W. 61 (1886); Carr v. Whitebreast Fuel Co., 88 Iowa 131, 55 N. W. 205 (1893).

Michigan.—Gribben v. Atkinson, 64 Mich. 651, 15 Mor. Min. Rep. 428, 31 N. W. 570 (1887); Blake v. Lobb's Estate, 110 Mich. 608, 18 Mor. Min. Rep. 462, 68 N. W. 427 (1896); Hewitt Iron Min. Co. v. Dessau Co., 129 Mich. 590, 22 Mor. Min. Rep. 111, 89 N. W. 365, 8 Detroit L. N. 1093 (1902).

Minnesota.—Diamond Iron Min. Co. v. Buckeye Iron Min. Co., 70 Minn. 500, 19 Mor. Min. Rep. 197, 73 N. W. 507 (1897).

Ohio.—Cook v. Andrews, 36 Ohio St. 174, 3 Mor. Min. Rep. 171 (1880); Brick Co. v. Pond, 38 Ohio St. 65 (1882); Stahl v. Van Vleck, 53 Ohio St. 136, 18 Mor. Min. Rep. 231, 41 N. E. 31 (1895).

Pennsylvania.—Muhlenberg v. Henning, 116 Pa. St. 138, 15 Mor. Min. Rep.

iron-ore lease, in which it was provided that the lessee should mine and carry away at least 1,500 tons of ore each year during the continuance of the lease, "or in default thereof pay a royalty of $525 annually." An action being brought to recover the minimum royalty for two years, the defendants filed affidavits of defense, saying that they had entered upon the premises, and had expended $3,000 in buildings and machinery, and had prosecuted the work of mining for ore with due diligence for nine months, but were unable to find ore in sufficient quantity to enable them to carry out their contract, and that the ore they did find was not of a merchantable character. In the opinion, Justice Clark said: "If, however, it was established by actual and exhaustive search that at the time of the contract there was in fact no ore in the land, or no ore of the

423, 9 Atl. 144 (1887); Timlin v. Brown, 158 Pa. St. 606, 28 Atl. 236 (1893); Shellar v. Shivers, 171 Pa. St. 569, 18 Mor. Min. Rep. 260, 33 Atl. 95 (1895); Double v. Union Heat, etc., Co., 172 Pa. St. 388, 18 Mor. Min. Rep. 327, 33 Atl. 694 (1896); Boyer v. Fulmer, 176 Pa. St. 282, 35 Atl. 235 (1896); Williams v. Guffy, 178 Pa. St. 342, 18 Mor. Min. Rep. 478, 35 Atl. 875 (1896); Bannan v. Graeff, principal case.

Washington.—Adams v. Washington Brick, etc., Co., 38 Wash. 243, 80 Pac. 446 (1905). And see cases cited in II *supra*, this note.

Under a lease giving lessee the right to mine upon certain royalty, the lessees binding themselves to produce a certain tonnage, there is an implied covenant that mineral be found, and if after diligent search it appears that at the time the contract was made there was no mineral in the land, the lessee cannot be held liable for the royalty. Brooks v. Cook, 135 Ala. 219, 22 Mor. Min. Rep. 456, 34 So. 960 (1902).

Upon entering into contract to mine certain lands, it is presumed the parties contemplated the existence of ore in paying quantities, and if this be not found after diligent search, the lessee will not be required to pay the royalty, as to require him to do so would require him to bear a burden from which he derives no benefit. Colorado Fuel & Iron Co. v. Pryor, 25 Colo. 540, 19 Mor. Min. Rep. 544, 57 Pac. 51 (1898).

Where the purpose of a contract is the mining of certain rock, a failure upon proper endeavor to find such, is a good defense in an action for royalties, in the absence of agreements to the contrary. Hiller v. Walter Ray & Co. (Fla.), 52 So. 623 (1910).

Where lease of land for mining purposes contemplates the existence of the mineral to be mined, a provision for a minimum royalty in gross "whether the mining is carried on or not" relates to a failure to mine and not to a failure to find the required mineral. Hiller v. Water Ray & Co. (Fla.), 52 So. 623 (1910).

Under covenant for payment of specified rental for "each year in advance for every well from which the gas is used off the premises," action cannot be maintained for rent, when the well failed or it became impracticable to use the gas therefrom, as thereby the lessee was released from all liability. Indianapolis Gas Co. v. Teters, 15 Ind. App. 475, 18 Mor. Min. Rep. 391, 44 N. E. 549 (1896).

Under lease to pay an annual rental for a gas well so long as the same continues profitable, the landlord can recover only up to the time the well was abandoned as unprofitable, and not for the full year in which such abandonment

kind contracted for, it cannot be pretended, upon any fair or reasonable construction of the contract, that the lessees were nevertheless bound for the royalty of $525 annually; for the payment of the royalty was undoubtedly based upon the assumption of the parties that ore—ore of the quality specified—existed there. * * * And how could the lessees be in default in mining fifteen hundred tons annually if there was no ore to mine? We are not to construe the contract to require the lessees to do an impossible thing. The $525 is not a penalty. It is the price of the ore. The grant was of the ore in place, and, if the subject-matter of the contract fail, the price is not payable." The same doctrine was applied in McCahan v. Wharton, 121 Pa. St. 424, 16 Mor. Min. Rep. 239,

took place. Moon v. Pittsburg Plate Glass Co., 24 Ind. App. 34, 56 N. E. 108 (1900).

Under lease for three years "or so long as oil or gas is found on the premises," upon payment of an annual rental for each well from which gas is produced there is no liability for the rental after the gas has ceased to flow with sufficient force to enable the lessee to utilize it. Indianapolis Gas Co. v. Teters, 15 Ind. App. 475, 18 Mor. Min. Rep. 391, 44 N. E. 549 (1896).

Where, after proper prospecting and search, no ore is found, the lessee under a mining lease cannot be held liable for royalty although he covenanted to take out a certain fixed amount. Gribben v. Atkinson, 64 Mich. 651, 15 Mor. Min. Rep. 428, 31 N. W. 570 (1887).

If, after reasonable search and effort on the part of the lessee, no ore is found, a lease providing for exploring, mining, taking out, and removing ore fails, and no rent can be recovered from the lessee. Blake v. Lobb's Estate, 110 Mich. 608, 18 Mor. Min. Rep. 462, 68 N. W. 427 (1896).

Under a lease requiring mining of a certain quantity of ore sufficient to produce a certain minimum royalty or otherwise the payment thereof, the exhaustion of the ore relieves the lessee from the payment of any royalty except that upon the ore actually found. Hewitt Iron Min. Co. v. Dessau Company, 129 Mich. 590, 22 Mor. Min. Rep. 111, 89 N. W. 365, 8 Detroit L. N. 1093 (1902).

Under agreement by which land was to be tested for coal, and in case mining was not commenced within one year the payment of an annual rent, the owner cannot recover in action for the rent if no coal existed in the land; but the burden of showing none existed there is on the defendant. Cook v. Andrews & Hitchcock, 36 Ohio St. 174, 3 Mor. Min. Rep. 171 (1880).

Under covenant to mine a certain number of tons per year, or in default thereof pay a certain amount, the exhaustion of the mineral is a good defense to an action on the covenant. Muhlenberg v. Henning, 116 Pa. St. 138, 15 Mor. Min. Rep. 423 (1887).

Under a lease granting lessee the right to dig for, mine, and take away iron ore for a period of fifteen years, paying a certain royalty therefor, and providing that if enough ore was not produced in any year to make up a certain minimum amount, that amount should be paid, to be made up in some subsequent year, but containing no agreement of any kind to pay a fixed absolute minimum sum for the ore in place, the lessees are not liable for the minimum rent after the ore has become exhausted. Boyer v. Fulmer, 176 Pa. St. 282, 35 Atl. 235 (1896).

15 Atl. 615, and in Boyer v. Fulmer, 176 Pa. St. 282, 35 Atl. 235. In the latter case the lease was for the mining of iron ore, and the royalty was to be 60 cents a ton for every ton of ore sold from the premises, but the amount was to be not less than $400 each year. On the trial of an action for the unpaid royalties the defendant offered to prove that he had mined whatever ore it was possible to obtain on the premises, that he has expended $10,000 in his efforts to obtain ore, that the ore in the place was exhausted, and that the premises did not contain the quantity of ore necessary to produce the minimum quantity of ore fit for use in a furnace, to pay the royalty fixed. The court below rejected the offers of testimony, and instructed the jury to render a ver-

Where a well becomes exhausted and is abandoned there is no further liability for rent under a lease providing for annual rental for each well after gas is found in paying quantities. Williams v. Guffy, 178 Pa. St. 342, 18 Mor. Min. Rep. 478, 35 Atl. 875 (1896).

Lessee will not be required to pay the minimum royalty under a lease providing for the production of a certain amount of coal "unless prevented from doing so by any unavoidable accident or occurrences beyond their control," where the coal has become exhausted. Bannan v. Graeff, principal case.

It is no defense that the enterprise did not prove as profitable as the lessee expected. Skillen v. Logan, 21 Pa. Super. Ct. 106 (1902).

The lessee is at the risk of the quantity and value of the subject-matter, but not of the being or existence of it, and therefore if there is a total destruction or exhaustion of the subject-matter of the lease, or if it be found not to exist, the lessee may abandon the lease. Gowan v. Christie, L. R. 2 H. L. (Sc.) 273, 5 Moak 114, 8 Mor. Min. Rep. 688 (1873).

Where covenant is that on failure to take out a stipulated quantity, royalty with respect thereto shall neverthless be paid, the nonexistence or exhaustion of the mineral is a good defense. Lord Clifford v. Watts, L. R. 5 C. P. 577 (1870).

VIII. Effect of Value of Mineral.

The mere fact that leased premises prove to be of less value than were supposed, is no defense to an action for rent. The nonexistence of things which were merely matters of inducement to the execution of the contract will not relieve a party from its obligations; but the case is entirely different where the thing contracted for, and which constituted the subject-matter of the contract, had no existence. Diamond Iron Min. Co. v. Buckeye Iron Min. Co., 70 Min. 500, 19 Mor. Min. Rep. 197, 73 N. W. 507 (1897).

Under covenant to work a mine as long as it was fairly workable, the tenant is not obliged to work at a dead loss. Jones v. Shears, 7 C. & P. 346, 32 Eng. C. L. 649, 8 Mor. Min. Rep. 333 (1836).

Lessee agreeing to pay royalty out of the proceeds of a mine is not bound to continue work at a loss, after reasonable efforts show that the property cannot be profitably worked. Caley v. Portland, 18 Colo. App. 390, 22 Mor. Min. Rep. 595, 71 Pac. 891 (1903).

Under a provision that a certain amount of ore should be mined provided it could be advantageously done, lessee is not required to mine unmerchantable ore or ore which could not be mined at a profit. Garman v. Potts, 135 Pa. St. 506, 16 Mor. Min. Rep. 108, 19 Atl. 1071, 26 W. N. C. 305 (1890).

dict for the plaintiff for the full amount claimed. An appeal was taken to this court, and we reversed the judgment; holding that while the defendant was bound to take out the ore, or pay the fixed royalty if the ore was there, yet if it was not there, or had become exhausted, the obligation to pay the royalty ceased. We said: "If the ore was not there at all, or became exhausted, so that it could no longer be taken out in such quantity, the lessee was not bound to pay for it. He could not do an impossible thing, and therefore could not be held liable for not doing it." These decisions control the present case. We are clearly of opinion that the learned court below was entirely correct in discharging the rule for judgment for want of a sufficient affidavit of defense.

Judgment affirmed and *procedendo* awarded.

Lessee is relieved from performance of covenant to work a mine in good and miner-like manner by the exhaustion of the mineral. Walker v. Tucker, 70 Ill. 527, 8 Mor. Min. Rep. 672 (1873).

Under covenant requiring a certain amount of coal to be taken out or the royalty thereon paid, unless prevented from taking out that quantity by accident or casualty, or circumstances not under the lessee's control, it was held that an unexpected inferiority of the coal, which made it unmerchantable, was a circumstance beyond the control of the lessee and released him from the payment of the royalty. Givens' Executors v. Providence Coal Co., 22 Ky. L. Rep. 1217, 60 S. W. 304 (1901).

IX. Nonexistence on Adjoining Property.

Under covenant to bore wells and operate them and, if successful, pay royalties, or otherwise a stipulated rent, it is not a sufficient test that no oil was found in adjoining properties and lessees are liable for rent so long as they retain their rights under the lease without surrender, although they do not enter into possession or prospect upon the property. Jamestown & F. R. Co. v. Egbert, 152 Pa. St. 53, 25 Atl. 151 (1892).

Lessee cannot show, in defense of an action for rent, that no oil or gas was found in wells drilled upon adjoining premises. Gibson v. Oliver, 158 Pa. St. 277, 27 Atl. 961 (1893).

Fact that no oil or gas was found in wells upon adjoining premises is no defense in an action on a covenant to drill wells or pay rental. Cochran v. Pew, 159 Pa. St. 184, 28 Atl. 219 (1893).

As to peculiar rules of construction applied to gas and oil leases, see note to Bellevue Gas & Oil Co. v. Pennell, *ante*, p. 396.

As to exploration, development, and operation required under gas or oil lease, see note to Mills v. Hartz, p. ——, vol. 3, this series.

SHAW v. CALDWELL et al.

[District Court of Appeal, Third District of California, April 3, 1911; rehearing denied by Supreme Court June 1, 1911.]

— Cal. —, 115 Pac. 941.

1. Deeds—Mining License.

A deed conveying one-half interest in a mine, with an agreement that the grantees may work said mine at their own cost and divide all proceeds for a period of twenty years equally among the parties, is construed as creating only a license with respect to the half retained.

2. Same—Implied Covenants.

A sale and conveyance of all right, title, and interest in property implies covenants of special warranty.

3. Same—Estoppel.

One conveying land with covenants of special warranty is estopped to set up any rights of ownership by virtue of a reservation in a former deed.

4. Lease—Distinguished from License.

The test to determine whether an agreement is a lease or a license is whether exclusive possession is given against all the world, including the owner, or whether a mere privilege to occupy under the owner is conferred.

5. License—Revocation.

A license is a mere personal privilege not binding upon subsequent grantees, and consequently revoked by conveyance of the land.

6. Same—Specialty.

The fact that a license is given by written instrument or by deed does not affect its revocability.

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action to recover proceeds of a mine by Herbert Shaw against E. F. Caldwell and others. Judgment for plaintiff. Defendants appeal. Reversed.

For appellants—J. C. Webster.

For respondents—J. B. Curtin.

BURNETT, J. On February 5, 1904, plaintiff was the owner of the Hunter Creek mine. On said date, by a grant, bargain, and sale deed, he conveyed to E. Caldwell and F. E. Caldwell "an undivided one-half interest in and to" said mine. It is recited in said deed that it was

NOTE.

Construction of conveyances, see King v. New York & Cleveland Gas Coal Co., 22 Mor. Min. Rep. 515.

"for and in consideration of one dollar to him in hand paid by the parties of the second part," and also "it being one of the considerations of this conveyance that said parties of the second part will, during the period in which the party of the first part shall be the owner of the remaining one-half of said mine, do and perform at their own cost and expense all work required to be done upon said mine in order to comply with the provisions of section 2324 of the Revised Statutes of the United States, and, should they fail at any time so to do, then the party of the first part shall be entitled to have said one-half interest in said mine as hereby conveyed, reconveyed to him, and the parties of the second part shall thereafter have no interest in said mine." The deed likewise contained this clause: "It is furthermore agreed that the parties of the second part may work and develop said mine at their own cost and expense and all gold or proceeds taken therefrom for a period of twenty years from date hereof shall be divided equally among the parties hereto, that is to say, each party hereto shall have one-third of said proceeds." On the 24th day of January, 1906, for a consideration of $100, plaintiff sold and conveyed to one Thomas Armstrong "all of his right, title and interest, same being a one-half undivided interest, of, in and to" said mine, and, prior to the beginning of this action defendant, D. J. Sutton, by mesne conveyances, had succeeded to this interest. On the 28th day of July, 1906, the said E. Caldwell conveyed all of his interest in said property to defendant Martha Caldwell. No gold was taken out of the mine until after the conveyance by plaintiff to Armstrong as aforesaid, and the action was brought to recover one-third of the proceeds of the development of the mine from and subsequent to July 30, 1906. The court found that the said agreement as to the division of the proceeds of the mine is still in full force and effect, and that "plaintiff is entitled to have paid over to him by defendants E. F. Caldwell and Martha Caldwell one-third of all gold and proceeds derived from operating and working the mine for a period of 20 years from and after the 5th day of February, 1904," and, upon an account taken, it was determined that at the time of the trial there was due, under this agreement, the sum of $72.30, for which amount judgment was entered for plaintiff. From this judgment, the appeal is taken by defendants E. F. Caldwell and Martha Caldwell.

The decisive factor in the case is the construction of said agreement as to the development of the mine and the division of the proceeds. By appellants it is contended that this constitutes a mere permission or license to work the property at their own expense, which might be exercised or not by the Caldwells, and which was in fact never exercised until it was revoked by the plaintiff when he executed the said conveyance to Armstrong. This seems to be in entire accord with the natural

and ordinary signification of the terms employed. It is to be observed that the agreement is "that the parties of the second part may work and develop said mine at their own cost and expense." More apt words could hardly have been selected to empower the parties of the second part to exercise a choice in the matter. It is not made imperative, and there is no agreement on their part that they will work the mine at their own expense. The only obligation imposed upon them is that concerning the division of the proceeds as aforesaid in case they exercise their discretion to so develop the mine. It is true that "may" is sometimes construed as "must," but this is only for the purpose of effectuating the intention of the parties. There does not appear to be any reason why we should depart here from the ordinary meaning of the terms employed.

On the other hand, several circumstances seem to concur in support of the natural interpretation of the language found in said agreement. One of these circumstances is the conduct of the parties themselves. Admittedly for two years no effect was given to this provision. Plaintiff worked the mine in connection with the other parties to the agreement, and there seems to have been no contention that the latter were required to operate it at their own expense. In other words, the parties, by their actions, interpreted the contract as permissive merely. Again, the only other possible view of the provision is that it was intended as a part of the consideration for the conveyance of one-half of the mine to said parties, or that it constitutes a limitation upon the estate conveyed to the latter.

As to the former contention, it may be said that there is nothing in the deed itself to show that it was a part of the consideration, and it seems unreasonable to conclude that it should be so held. Indeed, the consideration is mentioned expressly as $1 and the assessment work to be done by the grantees. Thereby, in accordance with a familiar rule of construction, must the provision before us be deemed no part of the consideration for said conveyance. Furthermore, it may be urged that the performance of the assessment work seems to have been sufficient compensation for one-half of the mine, and it may be added that, since the grantees were entitled to one-half of the proceeds by virtue of the said conveyance, the additional award of one-sixth could hardly have been considered more than sufficient to reimburse them for the labor and expense of the development of plaintiff's portion of the mine.

Likewise, we fail to see anything in the language used or the surrounding circumstances to indicate any purpose to impose any condition upon the estate conveyed to the grantees. By the formal terms employed in the granting clause, plaintiff did "grant, bargain and sell" to said grantees an undivided one-half interest in said premises, "together with all and

singular the tenements and appurtenances thereto belonging or otherwise appertaining." The fee thereby conveyed could only be reduced or qualified by language equally plain. Nothing of the kind is found. Indeed, if the agreement in controversy be regarded as a part of the consideration, it cannot be deemed as creating a condition subsequent or modifying in any degree the estate conveyed. In Hartman v. Reed, 50 Cal. 485, it is held that "if one conveys to another a tract of land, part of a Mexican grant, in consideration of an agreement by the other to prosecute the claim before the courts for final confirmation, and the grantee fails to fulfil his agreement, the title vests absolutely and the remedy of the grantor for the breach of the agreement is an action for damages."

In Lawrence v. Gayetty, 78 Cal. 126, 20 Pac. 382, 12 Am. St. Rep. 29, the consideration was the promise to make valuable improvements, and the court said: "It must be borne in mind that the plaintiff did not contract to convey upon the performance of the contract on the part of the defendants. Therefore his promise was not dependent upon theirs, nor was there anything appearing in the deed, or in the contract under which it was made, showing or tending to show that a compliance with their promise was regarded as a condition subsequent, or that a failure to perform on their part should in any way affect the title conveyed to them. The case is precisely in principle the same as if the plaintiff had conveyed and taken a note for the purchase money, and the defendants had failed to pay the same." In Cullen v. Sprigg, 83 Cal. 56, 23 Pac. 222, it is held that "the recital in a deed that it is in consideration of a certain sum and that the grantee is to do certain things is not an estate upon condition, not being in terms upon condition, nor containing a clause of re-entry or forfeiture." To the same effect is Behlow v. Southern Pac. R. Co., 130 Cal. 16, 62 Pac. 295, wherein the familiar doctrine is asserted that "conditions subsequent, especially when relied on to work a forfeiture, must be created by express terms or clear implication and are to be construed strictly against a forfeiture, which is not favored in law." It is held, further, that "a provision in the deed by which the railway company agrees, as a further consideration of the grant, to place two stations at a location to be selected by the grantor, at which all trains must stop, is not a condition upon which the estate is granted and is not available to defeat the estate created by the grant, but is merely a personal covenant on the part of the grantee."

The situation is clearly brought within the definition of a license in respect to real estate, which is an authority to do a particular act or series of acts upon the land of another without possessing an estate therein. 25 Cyc. 640. The test to determine whether an agreement for the use of real estate is a license or a lease is whether the contract gives

exclusive possession of the premises against all the world, including the owner, in which case it is a lease, or whether it merely confers a privilege to occupy under the owner, in which case it is a license, and this is a question of law arising out of the construction of the instrument. Id.

It is said in Wheeler et al. v. West et al., 71 Cal. 126, 11 Pac. 871: "There is a broad distinction between a lease of a mine, under which the lessee enters into possession and takes an estate in the property, and a license to work the same mine. In the latter case the licensee has no permanent interest in the property, or estate in the land itself, but only in the proceeds, and in such proceeds, not as realty but as personal property; and his possession, like that of an individual under a contract with the owner of land to cut timber or harvest a crop of potatoes thereon for a share of the proceeds, is the possession of the owner." This license granted to the said parties affected, of course, only the one-half interest belonging to plaintiff, as their ownership of the other half carried with it necessarily the right of possession and development.

As to the plaintiff, his right under the provision in question was to insist upon one-third of the proceeds of the mine in case the licensees exercised their option, and it was his privilege to revoke the license at his pleasure. The license was in fact revoked by his said conveyance to Armstrong. This necessarily follows from the nature of a license. It being a mere personal privilege, it is not, of course, a covenant running with the land, it does not bind, therefore, the successors in interest of the parties, and it would be manifestly inequitable to allow the plaintiff to enjoy the benefits of the agreement when he had deprived the other parties of the reciprocal privilege conferred by said provision.

"A license is founded upon personal confidences, a mere personal privilege extending to the person to whom it is given, and is therefore not assignable and an attempt to assign terminates the privilege." "A mere license, which is nothing more than a personal privilege, is revocable at the pleasure of the licensor, and the fact that the license was created by a written instrument, or even conferred by deed, does not affect the rule of revocability at the option of the licensor." 25 Cyc. 644. "A license may be revoked by a sale and conveyance of the land without reserving the privilege to the licensee or by a lease or mortgage of the same, for a mere license cannot work a breach of the warranty of title." 25 Cyc. 650.

The foregoing is undoubtedly the view of the situation taken by plaintiff when he executed said deed to Armstrong. The following covenants were therein implied: "(1) That previous to the time of the execution of such conveyance the grantor has not conveyed the same estate, or any right, title, or interest therein, to any person other than the grantee.

(2) That such estate is at the time of the execution of such conveyance free from incumbrance, done, made, or suffered by the grantor, or any person claiming under him." Section 1113, Civ. Code. According to respondent's theory of the case he had previously conferred upon said grantees the right to the exclusive possession of the whole of said land for the term of twenty years and he comes into court insisting that they now have such right.

He cannot do this in the face of his warranty that he had not conveyed any interest in his part of the property to any one, and had not suffered any incumbrance to attach to it. But it is insisted that Armstrong had notice of the previous conveyance, and therefore he took the estate subject to the previously imposed burden.

Manifestly this would be of material significance if the former grantees were asserting some interest in the estate apparently conveyed by plaintiff to Armstrong, but it would require a long search to find an authority holding that the grantor of such a conveyance would be heard to assert that he was still the owner of an interest by virtue of a reservation in a former deed. By the said conveyance, the plaintiff does not only "grant, bargain, sell, remise, release, and forever quitclaim unto the said party of the second part, and to his heirs and assigns, all of his right, title and interest, same being a one-half undivided interest in and to" said property, but he specifies "together with all the dips, spurs and angles and also all the metals, ores, gold and silver bearing rock, quartz rock and earth therein; and all the rights, privileges and franchises thereto incident, appendant and appurtenant or therewith usually had and enjoyed, and also all and singular the tenements, hereditaments and appurtenances thereto belonging or in any wise appertaining, and the rents, issues and profits thereof." It is needless to add that, in view of the foregoing recitals, it is a conclusive presumption against the plaintiff that he was at the time the absolute owner of an undivided one-half interest in said mine. Subdivision 2, § 1962, Code Civ. Proc.

Nor can it be claimed that this is a circumstance of no concern to appellants. They have recognized the said provisions as conferring simply a personal privilege, and therefore, considering it revoked by the said deed from plaintiff to Armstrong, they cannot consistently dispute the right of Armstrong's grantee to one-half of the proceeds of the mine. Under respondent's contention, they must unquestionably yield to him two-thirds of the balance, and be content with one-sixth of what the mine yields.

The case upon which respondent principally relies is Downing v. Rademacher, 133 Cal. 220, 65 Pac. 385, 85 Am. St. Rep. 160, Therein it is held, as stated in the syllabus, that "where the owner of a mine deeded two-thirds thereof, the sole consideration of which was a contemporaneous

written agreement reciting its execution and agreeing that the grantee should have the exclusive right to work the mine, and should mill and reduce all ores taken therefrom, and deliver one-third of all minerals to the grantor, the deed and agreement constitute one instrument as between the parties and grantees with notice, and must be read as though each referred to the other and incorporated its terms; and the deed is in effect subject to the conditions set forth in the agreement." It is to be observed as to that case that the contract entered into was the sole consideration for the deed, there was an entire failure of such consideration, and the court held that the circumstances showed that the grant of the mine was conditional. From another standpoint the conclusion of the court is shown to be just and equitable. Downing brought suit to quiet his title. This, as well settled, is an equitable action. The circumstances of the case made peculiarly applicable the maxim that "he who seeks equity must do equity." It is indeed strange that it should be contended that a plaintiff declining to pay any part of the consideration or to meet his obligation imposed thereby could obtain from a court of equity a decree establishing his title without being required, as a condition precedent, to perform his promise, by virtue of which the conveyance to him had been made. As stated in the Downing case by the late Mr. Justice Temple: "As between the parties, at least, there is no such magic in a conveyance of a title in fee which can be used to do an owner out of his property."

The cases from other jurisdictions cited by the court in the Downing case also exhibit a situation totally different from what we have here. For instance, in Richter v. Richter, 111 Ind. 456, 12 N. E. 698, the real consideration was a contemporaneous agreement in writing by the terms of which the son agreed to support his father so long as he should live. A few months afterwards the son refused to perform this contract. The father brought suit for a reconveyance. The defense was that the consideration for the deed was the agreement, and the only remedy the father had was to sue upon it. But the court, applying the familiar doctrine that, "in the construction of deeds as in construing other writings courts seek to ascertain and give effect to the real intention of the parties as such intention may be gathered from the language of the whole instrument," reached the just conclusion that the parties intended that the estate should be held and enjoyed on condition that the grantee perform the acts specified and therefore that it was a conditional estate. So in Manning v. Frazier, 96 Ill. 279, the defendant entered into a written contract with John R. Squire and O. D. Payne by which he, in consideration of $1 and the agreements contained in the contract, bargained, sold, and conveyed to them, their heirs and assigns, all of the coal, limestone, iron ore, rock oil, and other minerals in, upon, or under a certain farm or

tract of land which was particularly described, and contains 700 acres. The deed granted to them the right to enter upon and search for such minerals, and to dig, mine, explore, and occupy with neccessary structures and buildings, and to mine and remove the coal, limestone, etc. And the parties of the second part were bound to enter upon and make search for coal, etc., within two years from that date. They were also bound to have preparations made for taking out coal for market within two years and they were to pay to the party of the first part 12 cents for each ton of coal and limestone mined and removed from the land, and for ore 10 cents per ton, payments to be made quarterly. The only questions decided were that the transaction amounted to a sale of real estate and that the grantor had a vendor's lien on the coal, etc., in the entire mine for the whole of the purchase price, the court saying: "The minerals were sold, the purchase money was not paid, and, as complainant did nothing manifesting an intention to waive his vendor's lien, equity will hold that it attached and must be enforced for the amount of purchase money due and unpaid." It must be apparent that none of the foregoing cases involved the question of license and each of them possessed features appealing irresistibly to the conscience and compelling the decision that was rendered.

To summarize: It appears reasonably certain: (1) That a mere license was created by the agreement in controversy and not a condition subsequent. (2) That it operated neither to convey nor to reserve any estate in any part of the mine to which it related. Indeed, this is implied in the finding of the court "that on the 5th day of February, 1904, the plaintiff executed to one E. Caldwell and defendant E. F. Caldwell an instrument in writing wherein and whereby the said plaintiff did sell and convey unto said E. Caldwell and defendant E. F. Caldwell the individual one-half of the Hunter Creek mine," and "that on the 24th day of January, 1904, the plaintiff sold and conveyed the remaining one-half of said Hunter Creek mine to one Thomas Armstrong by deed and conveyance in the words and figures following." (3) That the payment by said licensees to plaintiff of one-third of the proceeds in case the mine was operated by the former at their expense implied the reciprocal duty on the part of plaintiff not to interfere with their possession of the whole of said mine. (4) That said license was revocable at the pleasure of the licensor and it was actually revoked by said conveyance to Armstrong.

These views necessarily lead to a decision different from that reached by the learned trial judge, and the judgment and order are therefore reversed.

We concur: CHIPMAN, P. J.; HART, J.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO. v. DAVIS.

[Supreme Court of Oklahoma, May 10, 1910.]

26 Okla. 434, 109 Pac. 214.

(Syllabus by the Court.)

1. **Waters and Water Courses—Drainage of Surface Waters—Liability of Railroad Company.**

If a railroad company so constructs its roadbed and ditches as to divert surface water from its usual and ordinary course, and by its ditches or artificial channels causes such water to be conveyed to a particular place and thereby overflows the land of another proprietor, which before the construction of such road, ditches, or channels did not overflow, the company will be liable to such proprietor for the injury.*

2. **Same—Immaterial when Ditches, etc., Built.**

Whether the ditches or artificial channels be constructed on the right of way at the time of the construction of the road as a part thereof, or afterwards in the operation or maintenance of the same, is immaterial.

CASE NOTE.

Measure of Damages for Injury to Land or Crops by Inundation from Surface Water Diverted by Railroad Company.

*For note as to the liability of a railroad company for diverting surface waters, see note to Chicago, R. I. & P. R. Co. v. Johnson, p. ——, vol. 3, this series.

3. Same—Recovery and Measure of Damages for Overflow.

Where the wrong is of a permanent nature and continuous, springing from the manner in which the ditch or channel is completed, on account of the diversion of surface water, the land of the abutting proprietor necessarily being injured by such diverted water, such proprietor may treat the act of the railway company as a permanent injury and recover his damages in the consequent depreciation of the value of his property, and in such case the recovery of the damage results in a consent on the part of such proprietor to such manner of maintaining such ditch or channel, concluding both him and any subsequent owner of such land.

Action for damages to land caused by overflow of surface water. Judgment for plaintiff. Affirmed.

For plaintiff—W. C. Stevens, C. O. Blake, H. B. Low and T. R. Beman.

I. Scope of Note.

This note is confined to a consideration of portions of the plaintiff's lands by the overflowing of lands occasioned by the acts of railroad companies in the construction and operation of their roads; and while the same general rules apply to other persons inflicting similar injuries, and similar injuries from other causes, such cases are not here considered.

II. The Rule in General.

There are two classes of injuries to realty from the overflow of waters. The first includes injuries that are permanent in their nature, and for these the measure of damages is the depreciation in the market value of the property by reason of the defendant's wrong, once for all; the second class includes injuries that are temporary in their nature, and for these the measure of damages is the impairment of the use of the property by the wrongful act of the defendant up to the commencement of the action, with the right of successive suits if the wrong should be continued. The reason for the distinction is that the wrongdoer in the latter case will not be presumed to intend to continue his misconduct or to be given license so to do. Coleman v. Bennett, 111 Tenn. 705, 69 S. W. 734 (1902).

In an action for damages to growing crops and the prevention of the cultivation of portions of the plaintiff's lands occasioned by flooding by reason of the diversion of surface waters, the Appellate Court of Illinois said: "We understand the rules deducible from the decisions in this state as to the measure of damages in such cases as this to be as follows: (1) That for the lands plaintiff was prevented from tilling, he is entitled to recover the rental value; (2) that for the lands where the crops were not up, the damage should be estimated upon the basis of the rental value, and the cost of seed and labor in breaking up and planting or sowing; (3) that in cases of destruction where the crops were up or more or less matured, plaintiff should recover as is last above stated, and, in addition thereto, the cost of any labor bestowed after the planting or

For defendant—B. M. Parmenter, C. M. Myers, and C. O. Clark.

WILLIAMS, J. In the case of C., R. I. & P. R. Co., plaintiff in error, v. H. C. Johnson, defendant in error (No. 2,200, decided by this court on March 8, 1910, but not yet officially reported) [25 Okla. 760], 107 Pac. 662, it was held: "If a railroad company so constructs its roadbed and ditches as to divert surface water from its usual and ordinary course, and by its ditches or artificial channels causes such water to be conveyed to a particular place, and thereby overflows the land of another proprietor which, before the construction of such road, ditches,

sowing; or, at his option he may recover the value of the crop at the time of its destruction, with the right to the purchaser to mature the crop and harvest or gather it; (4) that where the crop was injured, but not destroyed, the assessment should be commensurate with the depreciation in value." Kankakee & S. R. Co. v. Horan, 17 Ill. App. 650 (1885).

In action for damages for flooding premises by reason of embankments, etc., damages were allowed for the destruction of crops, the rotting of the foundations of a building, and sickness in the family of the land owner. Hughes v. Anderson, 68 Ala. 280 (1880); Central of Georgia R. Co. v. Windham, 126 Ala. 552, 28 So. 392 (1900).

III. Permanent or Temporary Injury.

A. What a Permanent Injury.

Wherever the nuisance or cause of the injury is of a permanent character and its construction and continuance are necessarily an injury, the damage is original and permanent, and may be at once fully compensated. Chicago, R. I. & P. R. Co. v. Davis, principal case; Chicago, R. I. & P. R. Co. v. Johnson, p. ——, vol. 3, this series; St. Louis, I. M. & S. R. Co. v. Morris, 35 Ark. 622 (1880); Little Rock & Ft. S. R. Co. v. Chapman, 39 Ark. 463, 43 Am. Rep. 280 (1882); St. Louis, I. M. & S. R. Co. v. Biggs, 52 Ark. 240, 12 S. W. 331, 20 Am. St. Rep. 174, 6 L. R. A. 804 (1889).

The overflowing of land by the building of a levee occasions a permanent injury. St. Louis, I. M. & S. R. Co. v. Morris, 35 Ark. 622 (1880).

The erection, construction and putting into operation of a railroad causes a permanent damage. Chicago & E. I. R. Co. v. McAuley, 121 Ill. 160 (1887).

A railroad embankment closing the natural channel of a stream and diverting water from adjoining land causes a permanent damage. Stodghill v. Chicago, B. & Q. R. Co., 53 Iowa, 341 (1880).

The erection of a permanent dam across a stream, occasioning the water to flow back upon adjoining premises, causes a permanent injury. Bizer v. Ottumwa H. P. Co., 70 Iowa, 145 (1886)

The insufficiency of an outlet for surface water cut in a railroad embankment occasions a permanent injury. Haisch v. Keokuk & D. M. R. Co., 71 Iowa 606 (1887).

Where a culvert in a railroad embankment was so placed as to be dangerous to the operation of the road and was therefore removed to a place less dangerous, whereby the flooding of certain premises was caused, the owner of those premises was entitled to elect to consider the injury a permanent one. Fossun v. Chicago, M. & St. P. R. Co., 80 Minn. 9, 82 N. W. 979 (1900).

Where the wrong which occasions the injury is one springing from the manner of the construction of the road, the adjoining landowner may treat the act

or channels, did not overflow, the company will be liable to such proprietor for the injury." It was there also held to be immaterial "whether the ditches or artificial channels be constructed or made on the right of way at the time of the construction of the road as a part thereof, or afterwards in the maintenance and operation of the same." Further, in this, as in the Johnson case, the court instructed the jury that it was incumbent upon the plaintiff to show by preponderance of the evidence that the defendant by such ditch unnecessarily turned surface waters upon plaintiff's land in unnecessarily large quantities to

of the railroad company as a permanent injury and recover damages accordingly. Chciago, R. I. & P. R. Co. v. Johnson, principal case; Chicago, R. I. & P. R. Co. v. Davis, p. —, this volume (1910).

Where the land itself is actually injured and depreciated in value by the act done, no assumption in reference to future action can change the fixed situation and render that which is in fact a permanent injury only a temporary one in law. And where, if the cause be removed or abated as a nuisance, the original *status quo* cannot be restored, the injury is permanent. To be permanent it is not necessary that it strictly speaking be an absolute perpetuity and positively irremediable in the last degree. Permanency in the legal acceptation of the term does not include the idea of absolute, but one of practical, irremediability. Coleman v. Bennett, 111 Tenn. 705, 69 S. W. 734 (1902).

B. But One Action for Permanent Injury.

If all damages that may ever result are in law the result of its construction as an original wrong, then everything that is a damage in legal contemplation, whether for past or prospective losses, is recoverable in one action. Railroad Co. v. Cook, 57 Ark. 387, 21 S. W. 1066 (1893); St. Louis S. R. Co. v. Morris, 76 Ark. 542, 89 S. W. 846 (1905).

Where the injury is permanent, there can be but one recovery of damages, and that bars all others. Atchison, T. & S. F. R. Co. v. Jones, 110 Ill. App. 626 (1903).

C. What a Temporary Injury.

Where there is no change of condition in the surface of the soil or no permanent injury to the land itself, it cannot be considered a permanent injury. Green v. Taylor B. & H. R. Co., 79 Tex. 604, 15 S. W. 685 (1891).

Where the only injury is to the crops, and there is no damage to the land itself except the likelihood of future overflows, the damage is not permanent. Gulf C. & S. F. R. Co. v. Haskell, 3 Tex. Civ. App. 550, 23 S. W. 546 (1893).

Where the injury is not permanent in its nature, the measure of damage is the diminution in the rental or usable value of the land up to the time of the commencement of the suit. Jungblum v. Minneapolis, N. W. & S. W. R. Co., 70 Minn. 153, 72 N. W. 971 (1897); Fossun v. Chicago, M. & St. P. R. Co., 80 Minn. 9, 82 N. W. 979 (1900).

For a temporary injury the measure is the depreciation in the rental value, if the property be rented; or in the value of the use, if it be occupied by the owner during the continuance of the injury or during the time covered by the suit. Illinois Cent. R. Co. v. Nelson (Ky.), 127 S. W. 520 (1910).

D. Successive Actions for Continuing Injury.

Where injuries result from time to time or the wrong continues, the land-

plaintiff's damage and injury, in order to have a recovery against the defendant.

In addition to the cases cited in that case, we further call attention to the following cases: In Ostrom v. Sills, 24 Ontario Appeals, 526, the court said: "The doctrine of the civil law has not been adopted by the courts of this province. As regards mere surface water precipitated from the clouds in the form of rain or snow, it has been determined that no right of drainage exists *jure naturae,* and that, as long as surface water is not found flowing in a defined channel with visible edges or banks approaching one another and confining the water therein, the

owner is entitled to bring his action or actions for such injuries. Gulf C. & S. F. R. Co. v. Helsley, 62 Tex. 596 (1884); Green v. Taylor B. & H. R. Co., 79 Tex. 604, 15 S. W. 685 (1891).

Where the structure occasioning the injury is permanent in its character, not necessarily injurious, but may or may not be so, the injury to be compensated is the injury which has happened, and there may be as many successive recoveries as there are successive injuries. St. Louis, I. M. & S. R. Co. v. Biggs, 52 Ark. 240, 12 S. W. 331, 20 Am. St. Rep. 174, 6 L. R. A. 804 (1889); Railway Company v. Cook, 57 Ark. 387, 21 S. W. 1066 (1893); St. Louis L. S. R. Co. v. Morris, 76 Ark. 542, 89 S. W. 846 (1905).

IV. Actual Damages to Commencement of Action.

Only the actual damage suffered up to the time of the commencement of the action can be recovered. Hughes v. Anderson, 68 Ala. 280 (1880); Central of Georgia R. Co. v. Windham, 126 Ala. 552, 28 So. 392 (1900).

In the event of the injury of crops by an overflow, the measure of damage is the sum that will fairly compensate the owner for the actual value of the injury or damage to the crop or any part thereof. Little Rock & Ft. S. R. Co. v. Wallis, 82 Ark. 447, 102 S. W. 390 (1907).

The true measure of damage is the injury which the land and other property sustains from the successive overflows when they occurred. Thus, if the crop be destroyed, its value at the time of its destruction is the true measure; if the land be rendered less productive or otherwise injured, such sum as will be a just compensation for the injury inflicted is the proper measure. Gulf C. & S. F. R. Co. v. Helsley, 62 Tex. 593 (1884).

The measure of damage is the actual injury which the evidence may show the crops have actually sustained on the land at the times overflows may have been shown to have occurred by reason of the construction of the railroad. Green v. Taylor B. & H. R. Co., 79 Tex. 604, 15 S. W. 685 (1891).

Under the Texas statute, making railroad companies liable for failure to provide sufficient culverts, etc., the measure of damage is the extent of the injury done to the property, irrespective of its condition and use at the time the road was constructed. Texas & P. R. Co. v. Whitaker, 36 Tex. Civ. App. 571, 82 S. W. 1051 (1904).

The actual value is the measure of damage for crops destroyed. Gulf C. & S. F. R. Co. v. Helsley, 62 Tex. 596 (1884); Green v. Taylor B. & H. R. Co., 79 Tex. 604, 15 S. W. 685 (1891).

V. Injury to Land Itself.

A. Depreciation in Value.

Where the injury is permanent, the measure of damage is the difference in the value of the land immediately before

lower proprietor owes no servitude to the upper to receive the natural drainage. * * * Generally speaking, the upper proprietor may dispose of the surface water upon his land as he may see fit, but he cannot, by artificial drains or ditches, collect it or the water of stagnant pools or ponds upon his premises, and cast it in a body upon the proprietor below him to his injury. He cannot collect and concentrate such waters and pour them through an artificial ditch in unusual quantities upon his adjacent proprietor." In Young v. Tucker, 26 Ontario Appeals, 169, the court said: "The right of the defendant to drain his land by ditches is undoubted, but with this right is the correlative

and immediately after the injury, that is, the depreciation in the market value caused by the injury. Louisville, N. A. & C. R. Co. v. Sparks, 12 Ind. App. 410, 40 N. E. 546 (1895); Illinois Cent. R. Co. v. Nelson (Ky.), 127 S. W. 520 (1910); Fossun v. Chicago, M. & St. P. R. Co., 80 Minn. 9, 82 N. W. 979 (1900); Fremont & M. V. R. Co. v. Harlin, 50 Neb. 698, 70 N. W. 263, 61 Am. St. Rep. 578, 36 L. R. A. 417 (1897); Chicago, B. & Q. R. Co. v. Emmert, 53 Neb. 237, 73 N. W. 540, 68 Am. St. Rep. 602 (1897); Coleman v. Bennett, 111 Tenn. 705, 69 S. W. 734 (1902); Tyrus v. Kansas City, Ft. S. &. M. R. Co., 114 Tenn. 579, 86 S. W. 1074 (1905); San Antonio & A. P. R. Co. v. Mohl (Tex. Civ. App.), 37 S. W. 22 (1896); St. Louis S. W. R. Co. v. Terhune (Tex. Civ. App.), 94 S. W. 381 (1906); Missouri, K. & T. P. R. Co. of Texas v. Green, 44 Tex. Civ. App. 247, 99 S. W. 573 (1907); Missouri, K. & T. R. Co. of Texas v. Chilton, 52 Tex. Civ. App. 516, 118 S. W. 779 (1910).

The measure of damages for the overflow of land by means of an open ditch is the difference in value of the land with the ditch open and with it closed. St. Louis, I. M. & S. R. Co. v. Anderson, 62 Ark. 360, 35 S. W. 791 (1896).

Ordinarily the measure of damages from an overflow caused by an improperly constructed embankment is the loss to the owner from each successive flood; but if the injury be permanent and to the land itself, the measure is the difference in value of the land immediately before and immediately after the inundation. Owens v. Missouri P. R. Co., 67 Tex. 679, 4 S. W. 593 (1887).

Where a part of the land is rendered useless and the value of the whole impaired, the measure of damage is the value of the property immediately before and immediately after the occurrence of the injury. Texas Cent. R. Co. v. Clifton, 2 Tex. Civ. App. Cas. (Willson) 433, § 489 (1884).

B. Time Considered.

The difference in the value of the land before the building of the road and the value after the injury is not a correct measure of damage. Gulf C. & S. F. R. Co. v. Helsley, 62 Tex. 593 (1884).

The measure of damage for injury to land is the difference between the market value thereof immediately before and immediately after the injury, and not the value before and after the construction of the road. Texas & P. R. Co. v. Ford (Tex. Civ. App.), 117 S. W. 201 (1909).

C. Crop as Part of Land.

The crop should be considered as part of the realty, and therefore the measure of damages for the overflow of land and destruction of a crop is the difference in the value of the land immediately before and immediately after the inundation. Drake v. Chicago, R. I. & P. R. Co., 63 Iowa 302, 19 N. W. 215 (1884).

obligation to so construct them as to conduct the water which may be carried thereby to a proper and sufficient outlet, so that the water which may be discharged therefrom will do no injury to other proprietors. Anything short of this must, I think, be regarded as negligence for which the defendant would be answerable. The governing principle in cases such as this is that one cannot prevent injury to his own property by transferring that injury to his neighbor's property." The case of Whalley v. Lancashire & Yorkshire R. W. Co. (1884), 13 Q. B. D. 131, which is cited in the Johnson case, is also quoted at length with approval by the court in Young v. Tucker, *supra*. In Savannah, A. & M. R. v.

An injury to a growing crop is an injury to the land, and it is therefore proper to consider the same in fixing the damage done to the land. Ft. Worth & D. L. R. Co. v. Scott, 2 Tex. Civ. App. Cas. (Willson) 137, § 143 (1884).

D. Actual Damage or Compensation.

Where the injury is occasioned by the collecting of surface water and discharging of the same upon certain lands, the measure of damages is not the difference in value of the land before and after the injury, but the actual damage which has been suffered. Ready v. Missouri P. R. Co., 98 Mo. App. 467, 72 S. W. 142 (1903).

Where a landowner grants right of way to a railroad company upon stipulation that there shall be no overflow of the balance of his land, the actual damage suffered is the true measure. Sabine & T. R. Co. v. Joachimi, 58 Tex. 456 (1883).

In an action for damages for flooding land with surface water by reason of defective construction of a railroad, the measure of damage is the value of the crops destroyed and of the trees killed. Fremont & M. V. R. Co. v. Harlin, 50 Neb. 698, 70 N. W. 263, 61 Am. St. Rep. 578, 36 L. R. A. 417 (1897).

Where land has been rendered less productive or otherwise injured, the measure of damage is a fair compensation for the loss sustained. Gulf C. & S. F. R. Co. v. Helsley, 62 Tex. 596 (1884); Green v. Taylor B. & H. R. Co., 79 Tex. 604, 15 S. W. 685 (1891).

VI. Destruction of Growing Crop.

A. Value at Time and Place of Destruction.

The weight of authority seems to hold that the measure of damages for the destruction of a growing crop is its market value at the time and place of its destruction, considering all the existing circumstances, and while some authorities give as the measure of damage the value of the crop when matured and ready for market, less the expense of cultivating, harvesting, preparing for market, etc., it will be found that most of these cases merely state a rule of evidence or means of arriving at the value at the time of destruction; other cases give as the measure the difference in value of the land with and without the destroyed crop, but here again the result is the same, the value at the time of destruction. The measure of damages for the destruction of a growing crop is its fair and reasonable market value at the time of its destruction as shown by all the existing circumstances. Chicago, R. I. & P. R. Co. v. Johnson, p. ——, vol. 3, this series.

Illinois.—Ohio M. R. Co. v. Neutzel, 43 Ill. App. 108 (1891—reversed, but not on this point, 143 Ill. 46, 32 N. E. 529—1892); Baltimore & O. S. R. Co. v. Stewart, 128 Ill. App. 270 (1906).

Iowa.—Delshmutt v. Chicago, B. & Q. R. C. (Iowa), 126 N. W. 359 (1910).

Buford, 106 Ala. 303, 17 South. 395, Chief Justice Brickell, in speaking for the court, said: "The wrong intended to be guarded against is the diversion of water, causing it to flow upon the lands of another without his will, which did not naturally flow there; and it is not deemed material whether the water is diverted from a running stream, or is surface water caused to flow where it did not flow before. Farris v. Dudley, 78 Ala. 124, 56 Am. Rep. 24; Crabtree v. Baker, 75 Ala. 91, 51 Am. Rep. 424; Nininger v. Norwood, 72 Ala. 277, 47 Am. Rep. 412; Hughes v. Anderson, 68 Ala. 280, 44 Am. Rep. 147; Mayor v. Jones, 58 Ala. 654; Mayor v. Coleman, 58 Ala. 570; City Council v. Gilmer, 33

Kentucky.—Madisonville, H. & E. R. Co. v. Cates, 138 Ky. 257, 127 S. W. 988 (1910).

Minnesota.—Byrne v. Minneapolis & St. L. R. Co., 38 Minn. 212, 36 N. W. 339 (1888); Burnett v. Great Northern R. Co., 76 Minn. 461, 79 N. W. 523 (1899); Lommeland v. St. Paul, M. & M. R. Co., 35 Minn. 412, 25 N. W. 119 (1886).

Nebraska.—Chicago, B. & Q. R. Co. v. Emmert, 53 Neb. 237, 73 N. W. 540, 68 Am. St. Rep. 602 (1897); Berard v. Atchison & N. R. Co., 79 Neb. 830, 113 N. W. 537 (1907); Smith v. Chicago, B. & Q. R. Co., 81 Neb. 186, 115 N. W. 755 (1908); Pribbeno v. Chicago, B. & Q. R. Co., 81 Neb. 657, 116 N. W. 494 (1908); Morse v. Chicago, B. & Q. R. Co., 81 Neb. 745, 116 N. W. 859 (1908).

Texas.—Gulf C. & S. F. R. Co. v. Hedrick (Tex.), 7 S. W. 353 (1887); Trinity & S. R. Co. v. Schofield, 72 Tex. 496, 10 S. W. 575 (1889); Sabine & E. T. R. Co. v. Smith, 73 Tex. 1, 11 S. W. 123 (1889); Ft. Worth & D. L. R. Co. v. Scott, 2 Tex. Civ. App. Cas. (Willson) 137, § 143 (1884); Missouri P. R. Co. v. Johnson, 3 Tex. Civ. App. Cas. (Willson) 334, § 276 (1887); Galveston, H. & S. A. R. Co. v. Borsky, 2 Tex. Civ. App. 545, 21 S. W. 1011 (1893); Galveston, H. & S. A. R. Co. v. Ryan (Tex. Civ. App.), 21 S. W. 1013 (1893); Gulf C. & S. F. R. Co. v. Haskell, 3 Tex. Civ. App. 550, 23 S. W. 546 (1893); Gulf C. & S. F. R. Co. v. Nicholson (Tex. Civ. App.), 25 S. W. 54 (1894); Gulf C. & S. F. R. Co. v. Carter, 5 Tex. Civ. App. 675, 25 S. W. 1023 (1894); International & G. N. R. Co. v. Foster, 45 Tex. Civ. App. 334, 100 S. W. 1017 (1907). And not necessarily the rental value of the land. Byrne v. Minneapolis & St. L. R. Co., 38 Minn. 212, 36 N. W. 339 (1888).

Considering all the circumstances at that time existing or existing at any time prior to the trial as bearing upon the probability that the crop would attain a more valuable condition, with legal interest from the date of destruction. St. Louis, I. M. & S. R. Co. v. Yarborough, 56 Ark. 612, 20 So. 515 (1892); St. Louis, M. & S. A. R. Co. v. Lyman, 57 Ark. 512, 22 S. W. 170 (1893); St. Louis, I. M. & S. R. Co. v. Hardie, 87 Ark. 475, 113 S. W. 31 (1908); St. Louis, I. M. & S. R. Co. v. Paup (Ark.) 22 S. W. 213 (1893). As shown by the estimates of competent witnesses. Gulf C. & S. F. R. Co. v. Calhoun (Tex. Civ. App), 24 S. W. 362 (1893). With the value of the right to harvest and market it at the proper time. St. Louis M. B. T. R. Assoc. v. Schultz, 226 Ill. 409, 80 N. E. 879 (1907), affirming 126 Ill. App. 552 (1906). With legal interest to time of trial. Trinity & S. R. Co. v. Schofield, 72 Tex. 496, 10 S. W. 575 (1889); Kansas City, M. & O. R. Co. v. Mayfield (Tex. Civ. App.), 107 S. W. 940 (1908). But to ascertain this value, evidence of the probable yield if not destroyed will be considered. Chicago, B. & Q. R. Co.

Ala. 116, 70 Am. Dec. 562. In Hughes v. Anderson, *supra,* it was said by Stone, J., after a statement of the general doctrine as we have expressed it, that it could not be 'enforced, in the strict letter, without impeding agricultural progress, and without hindering industrial enterprises. Hence, minor individual interest is sometimes made to yield to a large and paramount good.' But in this connection he further observed: 'This, however, must be weighed and decided with a proper reference to the value and necessity of the improvement of the superior heritage contrasted with the injury to the inferior, and even this license must be conceded with great caution and prudence.' This case

v. Schaffer, 26 Ill. App. 280 (1887). Taking all proper expenses from the value of the probable yield when matured. Missouri, K. & T. R. Co. v. Hagler (Tex. Civ. App.), 112 S. W. 783 (1908); Missouri, K. & T. R. Co. v. Riverhead Farm, 53 Tex. Civ. App. 643, 117 S. W. 1049 (1909). And evidence of the cost to put in and cultivate such crop up to the time of destruction is not admissible, as the value to be determined depends upon the present condition and future prospects of the crop. Chicago & E. R. Co. v. Barnes, 10 Ind. App. 460, 38 N. E. 428 (1894). But evidence of the values of crops of that variety after maturity in that year is admissible. Gulf C. & S. F. R. Co. v. McGovern, 73 Tex. 355, 111 S. W. 336 (1889).

In action for damages for flooding premises by improper embankment, the following instruction was held proper; "The court instructs the jury that if you find for the plaintiff, then you will assess his damages at a sum that will fairly compensate him for the actual value of the crops at the time of their destruction, with six per cent. interest thereon from the date of such destruction, in the event you should find from the evidence that the said crops or any part thereof were destroyed. And in the event you should find from the evidence that said crops or any part thereof were injured and damaged by such overflow, then you will find in favor of the plaintiff in a sum that will fairly compensate him for the actual value of such injury or damage to such crop or any part thereof." Little Rock & Ft. S. R. Co. v. Wallis, 82 Ark. 447, 102 S. W. 390 (1907).

B. Probable Yield, Deducting Expense.

Measure of damage for destruction of growing crop is the probable yield under proper cultivation. The value of such yield when matured and ready for sale, and also the expense of producing the crop, harvesting it, and preparing it for and transferring it to market should be considered. Galveston, H. & S. A. R. Co. v. Borsky, 2 Tex. Civ. App. 545, 21 S. W. 1011 (1893).

The difference between the probable crop which would have been produced and the expense of maturing, preparing for market and marketing the same, is the measure of damages for crops destroyed. San Antonio & A. R. Co. v. Kirsey (Tex. Civ. App.), 81 S. W. 1045 (1904).

It is permissible as a means of arriving at the value of a growing crop to prove its probable yield under proper cultivation, the value of such yield when matured and ready for sale, and also the expense of such cultivation as well as the cost of its preparation and transportation to market. The difference between the value of the probable crop in the market and the expense of maturing and placing it there in most cases will give the value of the growing crop with

does not involve a discussion or consideration of this limitation of the general doctrine; for it is settled by the current and weight of authority that a railroad company has no more right to obstruct the natural flow of water by an embankment, or other artificial means, or by the collection of it into an artificial channel, forcing or conducting it to a discharge upon the lands of another, than it has, in the same way, to dispose of water from water courses, and it is liable for the resulting damage in the one case as in the other. Waterman v. Railroad Co., 30 Vt. 610, 73 Am. Dec. 326; Railroad Co. v. Morrison, 71 Ill. 616; Railroad Co. v. Cox, 91 Ill. 500; Railroad Co. v. Hays, 11 Lea [Tenn.] 382,

as much certainty as can be attained by any other method. Chicago, R. I. & P. R. Co. v. Johnson, p. —, vol. 3, this series.

In ascertaining the value of a growing crop at the time of its destruction, considerable latitude of inquiry is permissible from the nature of the case. The estimate must be based largely upon the condition, stage of growth, and promise of the grain, and the capacity of the land to produce crops. Consideration must also be given to the average product or yield of like crops upon the same and other lands in the neighborhood under like circumstances and conditions, and also the average market value of such grain within reasonable limitations as to time and the expense of harvesting and marketing, to be submitted to the jury under proper instructions by the court. Lommeland v. St. Paul, M. & M. R. Co., 35 Minn. 412, 25 N. W. 119 (1886).

In the case of the International & G. N. R. Co. v. Pape, 73 Tex. 501, 11 S. W. 526 (1889), the court said: "It seems to us that as a general rule the most satisfactory means of arriving at the value of a growing crop is to prove its probable yield under proper cultivation, the value of such yield when matured and ready for sale, and also the expense of such cultivation, as well as the cost of its preparation and transportation to market. The difference between the value of the probable crop in the market and the expense of maturing, preparing, and placing it there will, in most cases, give the value of the growing crops with as much certainty as can be attained by any other method."

In Railway Co. v. Lyman, 57 Ark. 512, 22 S. W. 170 (1893), the court said: "Under the ruling next complained of, the plaintiff was permitted to give in evidence his opinion as to the value of the crops at the time of their destruction, and to state as the basis of his valuation the usual yield of the lands in crop seasons similar to that of 1888. The witness being a farmer, his opinion was admissible to prove the value of the crop, and it was proper to permit him to state the facts from which his conclusion was arrived at, as these would aid the jury in determining whether his estimate was correct. * * * While the damages recoverable could not exceed the actual value of the crops at the date of the injury, with legal interest, it was not improper that the jury in estimating that value should consider the probable value at maturity, if they believed from the evidence that the crops would have matured but for their loss in the manner alleged in the complaint."

In the case of Colorado Consol. L. & W. Co. v. Hartman, 5 Colo. App. 150, 38 Pac. 62 (1894), the court said: "But in order to establish the value at the time of the destruction, courts are compelled to resort to several methods of computation, and either or all combined may afford a fair basis. One method might be a year's rental value, with the

47 Am. Rep. 291; Railroad Co. v. Davis, 68 Md. 281, 11 Atl. 822, 6 Am. St. Rep. 440; Austin & N. W. Ry. Co. v. Anderson, 79 Tex. 427, 15 S. W. 484, 23 Am. St. Rep. 350; Railway Co. v. Mossman, 90 Tenn. 157, 16 S. W. 64, 25 Am. St. Rep. 670." See, also, Ala. Great South. R. Co. v. Prouty, 149 Ala. 71, 43 So. 354. In G., C. & S. F. Ry. Co. v. Helsley, 62 Tex. 596, the court said: "Even by courts which follow what is considered the common-law rule, if surface water is collected into artificial channels and thereby in increased quantities thrown upon the land of another, the person who causes this to be done will be liable for such injury as results." In Kelly v. Kansas City Southern R. Co.,

cost of planting and bringing forward the crop until the time of its loss; another, what the crop would bring in its immature state at a sale; and, a third, the proof of the average yield and the market value of crops of the same kind planted and cared for in the same manner, less the cost of maturing, harvesting and marketing. While neither would afford positive proof, they would all seem to be proper, and the only way by which a jury could get the necessary data upon which to base a verdict. The question to be determined by the jury was the value of the crop at the time of the destruction. The supposed error, and the only one relied upon, was allowing witnesses to testify how much per acre the said crops were worth in their condition and stage of growth upon the land at the time of the alleged destruction thereof. There does not appear to have been any objection to the witnesses for lack of knowledge or for incompetency; no objection that a proper foundation had not been laid. From all that appears, the true value might be arrived at directly in this way. If such was the case, it would be much more satisfactory than by any other method."

In the case of Lommeland v. St. Paul, M. & M. R. Co., 35 Minn. 412, 29 N. W. 119 (1886), the court said: "In applying this rule a considerable latitude of inquiry is permissible, from the nature of the case. The estimate must be based largely upon the condition, stage of growth, and promise of the grain, and the capacity of the land to produce crops; and in addition to the opinions of witnesses qualified to speak in reference to the extent of the injury and of the value of the growing crop in its then condition, we think it would be proper to receive evidence of the average product or yield of like crops upon the same and other lands in the neighborhood under like circumstances and conditions, and also the average market value of such grain, within reasonable limitations as to time, and the expense of harvesting and marketing, to be submitted to the jury under proper instructions by the court. If the estimates are extravagant, the evidence may be sifted upon cross-examination and controverted by witnesses."

It is only where the crop is fully matured and ready to be harvested that the damage can be determined by the market value of the crop, less the cost of harvesting and marketing, which must include all care and preparation for market, such as threshing, packing, crating, baling and the like, according to the nature of the crop. Baltimore & O. S. R. Co. v. Stewart, 123 Ill. App. 270 (1906).

What the destroyed crop would have produced had it survived until harvest time is not a proper measure of damage. Gulf C. & S. F. R. Co. v. Holliday, 62 Tex. 512 (1886).

The value of a crop that would or might have been grown except for the overflow, when ready for market, without deducting therefrom the cost of

92 Ark. 465, 123 S. W. 664, the court said: "If a railroad company attempts to alter the course of the natural drainage of a tract of land, it must provide sufficient means for the escape of the flow of such water. If the railroad company attempts to gather up the water into ditches, it is bound to care for it so that it will not do an injury to an abutting owner."

The question as to the recovery of prospective losses also arises. In St. L., I. M. & S. R. Co. v. Biggs, 52 Ark. 240, 12 S. W. 331, 6 L. R. A. 804, 20 Am. St. Rep. 174, the late Judge Sandels, in speaking for the court said: "The rules applicable to the recovery of damages for the con-

producing, maturing, harvesting, and marketing cannot constitute the measure of damages. International & G. N. R. Co. v. Pape, 73 Tex. 501, 11 S. W. 526 (1889).

C. Rental Value or Value of Use.

Where the damage consists in the destruction of a growing crop too young to have a market value, and the season will not permit the planting of another crop, the rental value of the land is the measure of damages. St. Louis, I. M. & S. R. Co. v. Saunders, 85 Ark. 111, 107 S. E. 194 (1908).

Where the crop has been planted, but is not up, the measure of damage is the rental value of the land and the cost of the seeding and labor. Ohio & M. R. Co. v. Neutzel, 43 Ill. App. 108 (1891; reversed, but not on this point, 143 Ill. 46, 32 N. E. 529—1892); Baltimore & O. S. W. R. Co. v. Stewart, 128 Ill. App. 270 (1906).

Where the crop is up, but not so far matured that the product can be fairly determined, the measure of damage is the rental value, with the cost of preparing the ground, planting the crop, and the labor bestowed upon it. Baltimore & O. S. W. R. Co. v. Stewart, 128 Ill. App. 270 (1906).

Where the owner cultivates the land himself, the measure of damage for the destruction of immature crops is the difference between the value of lands with the crops growing thereon prior to the flooding and its value in the condition it is after the flood. Jefferis v. Chicago & N. W. R. Co., 147 Iowa 124, 124 N. W. 367 (1910).

For the destruction of an immature crop the measure of damages is the rental value, together with the cost of fertilization, of preparation for planting, cultivation of the crop, value of services in overlooking the same, and interest on the amount lost from the time of the injury to the verdict. Lamphy v. Atlantic C. L. R. Co., 63 S. C. 462, 41 S. E. 517 (1902).

Where no crop has been raised by reason of an overflow, the measure of damage is the rental value of the land, and this, although it be in possession of a tenant required to pay as rent a portion of the crops. Quinn v. Chicago, M. & St. P. R. Co., 23 S. D. 126, 120 N. W. 884 (1909).

VII. Injury to Crop.

A. Partial Destruction.

Where land has been flooded and parts of it rendered unfit for cultivation, the measure of damage is the rental value of the land so unfit for cultivation, the extra cost of planting and working a crop, less the cost of harvesting such part as is lost and the cost of reclearing the land. St. Louis, I. M. & S. R. Co. v. Hardie, 87 Ark. 475, 113 S. W. 31 (1908).

Where a partial crop is harvested, the measure of the damage is the difference between the value of that crop and of the crop which would have been made

struction and continuance of nuisances in cases of this kind are stated satisfactorily to this court by numerous authorities, as follows: Whenever the nuisance is of a permanent character and its construction and continuance are necessarily an injury, the damage is original, and may be at once fully compensated. In such case, the statute of limitations begins to run upon the construction of the nuisance. * * * But, when such structure is permanent in its character, and its construction and continuance are not necessarily injurious, but may or may not be so, the injury to be compensated in a suit is only the damage which has happened; and there may be as many successive recoveries as there are

except for the injury, deducting therefrom the difference between the cost of producing and gathering the part of the crop harvested and the crop which would have been made. Jonesboro, L. C. & E. R. Co. v. Cable, 89 Ark. 518, 117 S. W. 550 (1909).

B. Where Only Damaged.

Where part of a matured crop is destroyed, the value of such part at the nearest market, deducting the reasonable expense of getting it there, is the proper measure of damage. Kansas City M. & O. R. Co. v. Mayfield (Tex. Civ. App.), 107 S. W. 940 (1908).

The measure of damages where the crop is partially but not wholly destroyed, is the difference between its market value if it had one as it stood, immediately preceding and its market value immediately following the injury, with legal interest on the amount of such difference. When a matured crop is totally destroyed, the damages may be determined from evidence showing its value at the nearest market and the reasonable expense of getting it to such market. Kansas City M. & O. R. Co. v. Mayfield (Tex. Civ. App.), 107 S. W. 940 (1908).

Where a partial crop is raised, the recovery is confined to the excess of what would have been made had a full crop been had over that which was made. Texas & N. O. R. Co. v. Ochiltree (Tex. Civ. App.), 127 S. W. 584 (1910).

For injury to growing crops measure of damage is the value of the crops with and without the injury. Louisville, N. A. & C. R. Co. v. Sparks, 12 Ind. App. 410, 40 N. E. 546 (1895).

Where the land is not owned by the owner of the crops, the measure of damage is the reasonable market value of the crops as standing, immediately before and immediately after the injury, taking into consideration the right to market and harvest crop, and is not limited to the difference in value of the leasehold interest before and after the injury. Jefferis v. Chicago & N. W. R. Co., 147 Iowa 124, 124 N. W. 367 (1910).

Where damage to a crop only is claimed and not to the soil, either because of injury to it in connection with a permanent or perennial crop thereon, there is no good reason for not estimating the damage to such directly rather than indirectly, by estimating the value of the land with it before and after the injury. Necessarily such difference is the difference between the value of the growing crop thereon before and after the injury, and the same result is reached. The circumstance that growing crops ordinarily are regarded as part of the realty is not controlling, and in measuring the damages thereto the value of the land is not involved. Tretter v. Chicago G. W. R. Co., 147 Iowa 375, 126 N. W. 339 (1910).

Where growing crops are injured, but not destroyed, the measure of damage is their depreciation in value. Madison-

successive injuries." In Railway Company v. Cook, 57 Ark. 387, 21 S. W. 1066, the court said: "If all damages that may ever result from the nuisance are in law the result of its construction as an original wrong, then everything that is a damage in legal contemplation, whether for past or prospective losses, is recoverable in one action; but if the wrong be continuing, and the injuries successive, the damage done by each successive injury may be recovered in successive suits, and the injury to be compensated in the original suit is only the damage that has happened." In St. L. Southwestern R. Co. v. Morris, 76 Ark. 542, 89 S. W. 846, the court said: "Wood on Limi-

ville, H. & E. R. Co. v. Cates, 138 Ky. 257, 127 S. W. 988 (1910).

The measure of damage for the injury to a growing crop is the difference in value immediately before and immediately after the injury, and this is confined to the very time and place and does not extend to the time of maturity or to the place of usual market. Sabine & T. R. Co. v. Joachimi, 58 Tex. 456 (1883).

Where crops are damaged or partially destroyed, the measure is the difference between their actual value immediately before and immediately after the injury. Gulf C. & S. F. R. Co. v. Nicholson (Tex. Civ. App.), 25 S. W. 54 (1894).

The measure of damage for the injury to a growing crop is the difference between the reasonable market value at maturity of the crop that would have been raised if the injury had not occurred and the reasonable value at maturity of the crop actually raised, less the reasonable value of the additional work and expense which would have been incurred in raising and marketing the whole crop. Missouri, K. & T. R. Co. v. Gilbert (Tex. Civ. App.), 124 S. W. 434 (1910).

VIII. Perennial Crops.

"We see no reason to doubt that the actual loss of the perennial crop of grass was susceptible of being proved and measured with reasonable certainty. Whether the damages might have been measured by the diminution of the rental value if the case had been presented upon that theory, we need not determine." Byrne v. Minneapolis & St. L. R. Co., 38 Minn. 212, 36 N. W. 339, 8 Am. St. Rep. 668 (1888).

Measure of damages for grass pasture destroyed is fair value of the timothy and clover constituting the pasture at the time of its destruction. Chicago, B. & Q. R. Co. v. Emmert, 53 Neb. 237, 73 N. W. 540, 68 Am. St. Rep. 602 (1897).

Where the planting of a perennial crop such as alfalfa will increase the value of the land, it is proper to show the value with and without such planting. Moss v. Chicago, B. & Q. R. Co., 81 Neb. 745, 116 N. W. 859 (1908).

As the seeding of land to alfalfa and such like perennial crops is often a hazardous process, resulting in failure, it is much safer to take as the measure of damages the value of the land before and after the destruction of such crop than to take the cost of again seeding the land. Moss v. Chicago, B. & Q. R. Co., 81 Neb. 745, 116 N. W. 859 (1908).

The measure of damages for the destruction of a perennial crop of grass is its value at the time of destruction. Broussard v. Sabine & E. T. R. Co., 80 Tex. 329, 16 S. W. 30 (1891).

But where the injury is of such a character as to prevent the growth of grass and to deprive the owner of the use of his pasture for a considerable time, the most certain and correct damages would be the value of the use for

tations (3d Ed. § 180) says: 'But while this is the rule as to nuisances of a transient rather than of a permanent character, yet, when the original nuisance is of a permanent character, so that the damage inflicted hereby is of a permanent character, and goes to the destruction of the estate thereby, or will be likely to continue for an indefinite period, and during its existence deprived the landowner of any beneficial use of that portion of his estate, a recovery not only may, but is, deemed to be original; and as the entire damage accrues from the time the nuisance is created, and only one recovery may be had, the statute of limitations begins to run from the time of its erection against the owner

such time for purposes of pasturage in the condition it would have been had there been no overflow, there being no permanent injury to the land itself. Sabine & E. T. R. Co. v. Broussard, 69 Tex. 617, 7 S. W. 347 (1888); Broussard v. Sabine & E. T. R. Co., 80 Tex. 329, 16 S. W. 30 (1891).

IX. Other Matters Considered.

A. Several Crops in Same Year.

Where more than one crop is destroyed on the same land during the same year, by overflows, the measure of damages is the actual value of each crop at the time of its destruction, regardless of the value of other crops destroyed or of other crop or crops that may have been raised during the year. Galveston, H. & S. A. R. Co. v. Parr, 8 Tex. Civ. App. 280, 28 S. W. 264 (1894).

B. All Parts of Crop Considered.

All parts of the crop destroyed should be considered. Thus, as seed is a part of the cotton crop, the values that would have been obtained for such should be considered. St. Louis S. W. R. Co. v. Jenkins (Tex. Civ. App.), 89 S. W. 1106 (1905).

C. Damage to Crop and to Land Proved Separately.

The damage done to the land itself and that to the crops should be separately proved. Louisville, N. A. & C. R. Co. v. Sparks, 12 Ind. App. 410, 40 N. E. 546 (1895).

Where both land and crops are injured, it is better to ascertain the amount of the damage to the land and that to the crops separately, taking the sum thereof as the damages. International & G. N. R. Co. v. Pape, 73 Tex. 501, 11 S. W. 526 (1889).

X. Interest.

Where crop is destroyed by overflow from the improper construction of a railroad, the injured landowner ought, so far as money can accomplish it, be put in the same condition as he would have been had the injury not occurred, and interest on the value of the crop destroyed from the date of its destruction is as necessary as the value of the crop itself. Gulf C. & S. F. R. Co. v. Holliday, 65 Tex. 512 (1886).

In addition to the other damges, interest from the time of the injury may be allowed.

Arkansas.—St. Louis, I. M. & S. R. Co. v. Paup (Ark.), 22 S. W. 213 (1893); St. Louis, I. M. & S. A. R. Co. v. Lyman, 57 Ark. 512, 22 S. W. 170 (1893); St. Louis, I. M. & S. R. Co. v. Yarborough, 58 Ark. 612, 20 S. W. 515 (1894); Little Rock & Ft. S. R. Co. v. Wallis, 82 Ark. 447, 102 S. W. 390 (1907); St. Louis, I. M. & S. R. Co. v. Harder, 87 Ark. 475, 113 S. W. 31 (1908).

New York.—McCormick v. Pennsylvania C. R. Co., 49 N. Y. 303 (1872).

South Carolina.—Lamphy v. Atlantic C. L. R. Co., 63 S. C. 462, 41 S. E. 517 (1902).

of the estate or estates affected thereby." This rule has been repeatedly followed and applied according to the facts in each case by the Supreme Court of Arkansas. St. L., I. M. & S. R. Co. v. Yarborough, 56 Ark. 612, 20 S. W. 515; St. Louis, I. M. & S. R. Co. v. Anderson, 62 Ark. 360, 35 S. W. 791; St. Louis, I. M. & S. R. Co. v. Stephens, 72 Ark. 127, 78 S. W. 766; St. Louis Southwestern R. Co. v. Morris, 76 Ark. 542, 89 S. W. 846; Chicago, R. I. & P. R. Co. v. McCutchen, 80 Ark. 235, 96 S. W. 1054; St. Louis, I. M. & S. R. Co. v. Hoshall, 82 Ark. 387, 102 S. W. 207; Turner v. Overton et al., 86 Ark. 406, 111 S. W. 270, 20 L. R. A. (N. S.) 894. The Supreme Court of Alabama is in harmony

Texas.—Sabine & E. T. R. Co. v. Joachimi, 58 Tex. 456 (1883); Galveston, H. & S. A. R. Co. v. Horne, 69 Tex. 643, 9 S. W. 940 (1888); Trinity & S. R. Co. v. Schofield, 72 Tex. 496, 10 S. W. 575 (1889); Gulf C. & S. F. R. Co. v. Calhoun (Tex. Civ. App.), 24 S. W. 362 (1893); Missouri, K. & T. R. Co. v. Pfluger (Tex. Civ. App.), 25 S. W. 792 (1894); Texas & St. L. R. Co. v. Reid, 1 Tex. Civ. App. Cas. (White & W.) 120 (1882).

XI. Sickness in Family.

Where the overflow causes pools of stagnant water to form on the premises of a landowner, causing sickness in his family, damages may include the injuries to health, loss of services of minor children, and the expenses incurred thereby. Lockell v. Ft. Worth. R. G. R. Co., 78 Tex. 211, 14 S. W. 564 (1890).

Where as the result of negligence in construction by a railroad company, stagnant water is accumulated upon the premises of a landowner and sickness in his family results from the malarial poisons arising therefrom, he is entitled to recover for such sickness, and his expenses incurred thereby. Central of Georgia R. Co. v. Windham, 126 Ala. 252, 28 So. 392 (1900); San Antonio & A. R. Co. v. Gwynn (Tex.), 15 S. W. 509 (1891).

Where the overflow causes pools of stagnant water to form under or near the house of a landowner, causing sickness in his family, such sickness may be taken into consideration in estimating the damages. Gulf C. & S. F. R. Co. v. Richard, 11 Tex. Civ. App. 95, 32 S. W. 96 (1895).

XII. Obviation of Cause.

A. Where Cause Can Be Removed or Injury Remedied.

Where the damage is caused by a defective construction which may be remedied, it is but temporary, and the diminished rental value or usable value is the proper measure of damages. Kansas City, F. & S. M. R. Co. v. Cook, 57 Ark. 387, 21 S. W. 1066 (1893); St. Louis & S. R. Co. v. Mackey (Ark.), 129 S. W. 78 (1910). And not the depreciation in the salable value of the land. Kansas City, F. & S. M. R. Co. v. Cook, 57 Ark. 381, 21 S. W. 1066 (1893).

Where the cause of the damage is temporary, and can be remedied, the measure is the rental or usable value of the land and the market value of the personal property destroyed, or the diminished value of such if it be only damaged. St. Louis & S. R. Co. v. Mackey, (Ark.), 129 S. W. 78 (1910).

The injury cannot be considered permanent where the overflow is caused by a failure to make proper openings for the escape of the water, if upon the making of such openings the injury ceases, and hence in such case the measure of damages would be the value of the use of the land up to the time of the

with Arkansas on this question. In Savannah, A. & M. R. v. Buford, *supra,* the court said: "The roadbed and embankment are permanent and continuous structures; and if their erection had given the plaintiff a cause of action, and then all the damage which could have resulted had resulted, the statute of limitations would have commenced to run from the time of their completion. But if the thing complained of is not necessarily injurious, or is not an invasion of the rights of another, of itself affording no cause of action, then whatever of legal injury may result from it furnishes a cause of action accruing when the injury occurs, and then the statute of limitations commences to run, and there

commencement of the action, and not the difference in the market value of the land before and after the injury. Southern R. Co. v. Poetker (Ind. App.), 91 N. E. 610 (1910).

Where the flooding may cease at any time or be abated as a nuisance, by the judgment of a competent court, the injury is not considered permanent, and the measure of damage is that actually suffered and includes any and all resulting injuries, such as the destruction of grass, damage to buildings, etc. Ready v. Missouri P. R. Co., 98 Mo. App. 467, 72 S. W. 142 (1903).

Where the basis of recovery is the difference in the value of the land before and after the construction of a railroad, it is necessary in considering such depreciation to take into account the question whether the injury could be obviated in whole or in part by expending money to remove the obstruction. When there is a permanent injury that cannot be remedied, of course the measure is the depreciation in the value of the property injured, but when the cause of injury may be removed at a reasonable expense by the party injured, that fact should be considered. Chicago, R. I. & P. R. Co. v. Carey, 90 Ill. 514 (1878); Kankakee & S. R. Co. v. Horan, 22 Ill. App. 145 (1886).

B. Cost of Removal as Measure of Damage.

Measure of damages to unplanted land is the cost and expense of restoring it to its condition before the injury, and the loss occasioned by being deprived of its use, with legal interest. Sabine & T. R. Co. v. Joachimi, 58 Tex. 456 (1883).

C. Contra.

Measure of damage is the value of the crop destroyed, and not the cost of removal of the cause of the damage, where to effect such removal the plaintiff must necessarily become a trespasser. Cincinnati, I. & W. N. R. Co. v. Ward, 120 Ill. App. 212 (1905).

The expense which would be incurred to improve the property and prevent a recurrence of the injury is not a proper measure of damages. New York, P. & N. R. Co. v. Jones, 94 Md. 24, 50 Atl. 423 (1901).

D. Prevention of Injury by Landowner.

If the landowner could have prevented the damage by a reasonable effort, he is barred from a recovery. Atchison, T. & S. F. R. Co. v. Jones, 110 Ill. App. 626 (1903).

The landowner is bound to protect himself against the damage where he can do so by a reasonable effort and at small expense, as where by the construction of a ditch on his own land at a small expense the injury could be obviated, it is his duty to construct such ditch. Southern H. Co. v. Poetker (Ind. App.), 91 N. E. 610 (1910).

Landowner is not required to take steps to minimize the damage, as he owes

may be as many successive suits and recoveries as there are successive injuries." See, also, Polly v. McCall, 37 Ala. 20; Powers v. Council Bluffs, 45 Iowa 652, 24 Am. Rep. 795; Town of Troy v. Cheshire R. Co., 23 N. H. 103, 55 Am. Dec. 177; C. & E. I. R. Co. v. McAuley, 121 Ill. 164, 11 N. E. 67; Baker v. Leka, 48 Ill. App. 358; L. & N. R. Co. v. Cornelius, 111 Ky. 752, 64 S. W. 732; L. & N. R. Co. v. Orr, 91 Ky. 109, 15 S. W. 8; Central Branch U. P. R. Co. v. Twine, 23 Kan. 585, 33 Am. Rep. 203; Fremont, E. & M. V. R. Co. v. Harlin, 50 Neb. 698, 70 N. W. 263, 36 L. R. A. 417, 61 Am. St. Rep. 578; Watts v. Norfolk & Western Ry. Co., 39 W. Va. 196, 19 S. E. 521, 23 L. R. A. 674, 45

no duty to the railroad company to perform its obligation to take care of the water. Madisonville, H. & E. R. Co. v. Cates, 138 Ky. 257, 127 S. W. 988 (1910).

The digging of a ditch at a cost of about three hundred dollars is not an "ordinary effort and cost" or a nominal cost. Galveston, H. & S. A. R. Co. v. Borsky, 2 Tex. Civ. App. 545, 21 S. W. 1011 (1893).

XIII. Speculative Damages.

A showing that by reason of the inundation of his land a certain amount had been lost by the owner because of his inability to grow crops as well as by crops destroyed, is too uncertain and speculative as a measure of damages. New York, P. & N. R. Co. v. Jones, 94 Md. 24, 50 Atl. 423 (1901).

The loss of profits by delay in getting a crop to market is not a proper measure of damages. Sabine & T. R. Co. v. Joachimi, 58 Tex. 456 (1883).

What the plaintiff might have made had he planted another crop is too uncertain to base any estimate upon as to an amount to deduct from the actual damage. Gulf C. & S. F. R. Co. v. Holliday, 62 Tex. 512 (1886).

XIV. Punitive Damages.

Where the cause of the damage is an act wantonly or negligently done, punitive damages may be recovered. Central of Georgia R. Co. v. Windham, 126 Ala. 552, 28 So. 392 (1900).

Where a railroad company is guilty of gross negligence or wantonness in the maintenance of drains, culverts, etc., it is liable for punitive as well as actual damages. Central of Georgia R. Co. v. Keyton (not reported; see 148 Ala. 675), 41 So. 918 (1906).

XV. Double Damages Prohibited.

Where the complaint is that the land had been rendered incapable of producing as full crops as it did before, the owner cannot recover for the injury to the land and also for failure of the crop, as this would be warranting double damages. Illinois Cent. R. Co. v. Miller, 68 Miss. 760, 10 So. 61 (1901).

There cannot be a recovery for both the value of the land and damages for crops not planted, as such would be permitting a double recovery for the same wrong. Yazoo & M. V. R. Co. v. Darden, (Miss.), 34 So. 386 (1903).

XVI. Source of Liability Immaterial.

It makes no difference in the measure of damage whether the railroad company is obligated by contract to keep culverts, etc., open or where its liability is by law independent of contract. St. Louis, I. M. & S. R. Co. v. Hardie, 87 Ark. 475, 113 S. W. 31 (1908).

As to the liability of a railroad company for the diversion of surface waters, see note to Chicago, R. I. & P. R. Co. v. Johnson, p. ——, vol. 3, this series.

As to the liability of a railroad company for the diversion of surface waters,

Am. St. Rep. 894; Austin & N. W. Ry. Co. v. Anderson, 79 Tex. 427, 15 S. W. 484, 23 Am. St. Rep. 350; G., C. & S. F. R. Co. v. Helsley, 62 Tex. 593.

The instructions as to compensation for damages seem to be in accord with the rule announced by Judge Sandels in the Biggs case, and to be in harmony with the weight of authority.

It follows that the judgment of the lower court must be affirmed.

All the Justices concur except KANE, J., who dissents.

being measured by the same rule applied to individuals, see part V, note to Chicago, R. I. & P. R. Co. v. Johnson, p. ——, vol. 3, this series.

As to effect of manner, etc., of construction of road upon liability for diversion of surface waters, see part VII, note to Chicago, R. I. & P. R. Co. v. Johnson, p. ——, vol. 3, this series.

As to obligation to place culverts, etc., for escape of surface water, see par. 7, part VII, note to Chicago, R. I. & P. R. Co. v. Johnson, p. ——, vol. 3, this series.

As to liability for failure to maintain drains, culverts, etc., for escape of surface waters, see part X, note to Chicago, R. I. & P. R. Co. v. Johnson, p. ——, vol. 3, this series.

As to liability where damage is caused by extraordinary storm, see part XI, note to Chicago, R. I. & P. R. Co. v. Johnson, p. ——, vol. 3, this series, and part XII, note to Kramer v. City of Los Angeles, p. ——, vol. 2, this series.

As to the effect of right of way being acquired by condemnation or purchase upon liability of railroad company for diversion of surface waters, see part VI to note to Chicago, R. I. & P. R. Co. v. Johnson, p. ——, vol. 3, this series.

As to all damages occasioned by construction of railroad being presumed paid in award upon condemnation, see par. 1, part VI, note to Chicago, R. I. & P. R. Co. v. Johnson, p. ——, vol. 3, this series.

As to surface waters in general and the laws fixing rights and governing liabilities with reference thereto, see note to Harris v. Boutwell, p. ——, vol. 2, this series.

As to the right of drainage of dominant on to servient estate, and increasing burden of servitude, see note to Harris v. Boutwell, p. ——, vol. 2, this series.

As to diversion of a stream by riparian owner on his own land, see note to Cook v. Seaboard Air Line R. Co., p. ——, vol. 3, this series.

As to liability of municipal corporations for damages in the construction and maintenance of sewers, see note to Kramer v. City of Los Angeles, p. ——, vol. 2, this series.

As to measure of damage in action against municipal corporation for negligence in construction or maintenance of sewers, see part XIII, note to Kramer v. City of Los Angeles, p. ——, vol. 2, this series.

HARPER v. HILL et al.

[Supreme Court of California, January 11, 1911.]

— Cal. —, 113 Pac. 162.

1. Mining Claim—Mistaken Location of Apex.

One who locates a mining claim in good faith is protected in his possession of the surface marked out, although subsequent developments show his location of the apex of the vein to have been erroneous.

2. Same—Discovery of Mineral a Prerequisite.

A discovery of valuable mineral within the located boundaries is a prerequisite to a valid mineral location upon the public lands.

3. Pleading—Forfeiture of Claim Shown without Pleading.

Where a claim under another location is set up under the general issue in denial of title, evidence showing its forfeiture is admissible without pleading it.

4. Estoppel—Facts Must Be Pleaded.

The facts constituting an estoppel *in pais* must be specially pleaded.

In Bank. Appeal from Superior Court, Eldorado County; N. D. Arnot, Judge.

Action to recover possession of a mining claim by H. A. Harper against Seymour Hill and another. Judgment for plaintiff and order denying new trial. Defendants appeal. Reversed.

For appellant—W. J. McGee, Wm. E. Colby, and Geo. H. Thompson.

For respondent—Chas. A. Swisler.

SHAW, J. The defendants have appealed from the judgment and also from an order denying their motion for a new trial.

The plaintiff sued to recover possession of a mining claim known as the "Santa Ynez gold mine." The principal controversy is in regard to the respective rights of the plaintiff and defendants to the southerly part of said Santa Ynez claim which overlaps the northerly part of a mining claim located by the defendants known as the "Lookout quartz claim." The defendants also claim practically the whole of the surface of the Santa Ynez gold mine by virtue of a certain alleged mining location

NOTE.

As to rights of parties where the location crosses the lode, see notes to Argentine Mining Co. v. Terrible Mining Co., 17 Mor. Min. Rep. 109. Necessity for and effect of discovery of mineral on mining location, see note to Charlton v. Kelly, *ante*, p. 493.

known as the "Mountain View quartz claim." These claims of defendants were asserted in a cross-complaint. It is also claimed that defendants had a right to the ground under a location in 1896 of a claim called the "Success" mine. The court found that the locations of the Mountain View quartz claim and the Success claim were invalid and that the plaintiff was entitled to the ground within the Santa Ynez gold mine which overlapped the Lookout quartz claim, and gave judgment accordingly. All the claims in question were located upon public lands of the United States.

We will first consider the respective rights to the ground within the overlapping limits of the Lookout and Santa Ynez claims. The Lookout claim was located and marked on the ground in 1889 by the defendants, and ever since that time they have claimed possession of it and have done the work required by law. The Santa Ynez was located and marked by the plaintiff on September 21, 1904. His claim of right to include in it a part of the ground covered by the Lookout claim is based on the theory that the southerly line of the latter is situated more than 300 feet from the actual line of the apex of the Lookout lode or vein. The facts appear to be that in 1889, when the defendants made the original discovery and location of the Lookout mine, they put monuments at each end of the claim at the place where they then believed the apex of the vein to be. Corners were marked at each end at a distance of 300 feet from the end center monuments so placed, thus marking a claim 1,500 feet long and 600 feet wide, as the law provides and allows. At the trial evidence was introduced tending, as it is claimed, to prove that the monument so placed at the center of the east end of the claim had not been placed on the apex of the Lookout vein, but was located some 23 feet south of said apex. The findings describe, as the true line of the apex, a line running from the east line westerly through the claim. This line at its easterly end lies northerly of the line indicated as such by the original center end monuments. The court below was of the opinion that the actual line of the apex as disclosed by the evidence at the trial should control the boundaries of the claim, that the defendants had the right to only three hundred feet south of that line on the surface, and that, as the original southerly line was located more than that distance from the true line of the apex of the vein, such original line must be drawn in and the excess given to the plaintiff under his later location. The main question is whether the surface location and boundaries of a mining claim are to be determined by the position of the apex of the vein as it is ascertained and marked on the ground, in good faith, at the time the claim is originally located and marked, or by the real position of such apex as it may be subsequently proven to be, in a trial with an adjoining claimant.

Section 2320 of the United States Revised Statutes (U. S. Comp. St. 1901, p. 1424), so far as material to the question, is as follows: "A mining-claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining-claim shall be made until the discovery of the vein or lode within the limits of the vein located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface. * * * The end lines of each claim shall be parallel to each other." Section 2322 (page 1425) provides that the locators of a mining location "on any mineral vein, lode, or ledge," on the public domain, so long as they comply with the laws of the United States and local regulations consistent therewith, "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their location, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically" although below the apex, such veins, lodes, or ledges may diverge beyond the side line planes, but not where they go outside the end line planes. Section 2324 (page 1426) provides that "the location must be distinctly marked on the ground so that the boundaries can be readily traced," and that all records of mining claims shall contain "the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim." Sections 2325 and 2326 (pages 1429 and 1430) provide, in substance, that the owner of such mining location may obtain a patent from the United States therefor by procuring the surveyor general to survey and plat the same, filing an application in the proper land office and giving notice as directed. It is declared in section 2325 that "a patent for any land claimed and located for valuable deposits may be obtained"; that any person "having claimed and located a piece of land" may file application for a patent therefor.

The grant of the exclusive right of possession and enjoyment of the ground included within the lines of the location is a present grant which takes effect as soon as the location is legally made. It refers to the lines as then established, and gives the right to the ground inclosed thereby. The necessary implication of the language is that the "surface included within the lines of their locations" which they have an immediate right to possess and enjoy is the surface as then "distinctly marked on the ground." The statement that "no claim shall extend more than three hundred feet on each side of the middle of the vein at the surface," if taken strictly and literally, might seem to refer to the actual position

of the apex, rather than to the place marked as such by the locator. But the other provisions require a different interpretation.

The reference is to the vein as honestly marked by the claimant at the time as the center of the claim of which he then takes possession. There are also practical reasons which forbid such literal construction. Lodes or veins frequently do not appear upon the surface except at intervals. Sometimes they may not appear at all. The true apex or middle of the vein may not be accurately determinable except by extensive excavations. The eastern end of the vein of the Lookout mine was covered with soil at the time of the location. Its true position was only disclosed by subsequent excavations, and it is still in dispute. Such veins do not run in straight lines throughout their courses, but with many turns and angles. Detached masses projecting above the surface may be mistaken for the ledge or vein. The ore may occur in a blanket formation having no distinct apex. If the construction contended for should prevail, a mining location which the law declares shall secure an immediate right of possession to the surface within the marked lines would often be a mere float, a tentative location, to be changed and adjusted from time to time to the actual location of the vein, at the instance of adjoining claimants, as subsequent developments may indicate. It would not become fixed and permanent as against third persons, until the patent was issued. That the location, as made, may not be binding on the United States, and that in making the survey for a patent the Surveyor General may ascertain and locate the true line of the apex to fix the boundaries, may be conceded. See Howeth v. Sullenger, 113 Cal. 551, 45 Pac. 841. But it is the clear intent of the statute that in the meantime, and as against all others, the locator who has in good faith made the discovery and marked the boundaries with regard to the position of the apex as he then finds and believes it to be shall be protected in the possession of the surface thus ascertained, and that the monuments he then sets shall control the location of the claim. Any other interpretation would produce great confusion and uncertainty, and invite disputes and litigation. The object of the enactment of the statute, which evidently was to give certainty of location and security of titles to mining claims and prevent litigation over them, would be defeated.

Substantially the same effect was given to the statute by the Supreme Court of Nevada in Golden Fleece Co. v. Cable Con. Co., 12 Nev. 329, and Gleeson v. Martin White M. Co., 13 Nev. 456, Chief Justice Beatty, then of the Supreme Court of Nevada, writing the opinion. In the Golden Fleece case the plaintiff, after locating its claim according to what it then took to be the line of the vein, discovered that the actual course of the vein was at right angles to the line located. It then undertook to

swing its claim around to correspond with the true line of the vein. Others had in the meantime located the adjoining ground, and they objected to the change. After showing that under the rules of miners prior to the enactment of the statute of 1872 a claim was located by marking upon the vein alone, and that the vein was then the sole criterion of location, the court discusses the change made by that statute, saying: "Under that law (of 1872) it cannot be doubted that it (plaintiff) is bound by the lines of its surface claim in favor of a subsequent locator. It is true that the vein is the principal thing and the surface but an incident thereto; but it is also true that the mining law has provided no means of locating a vein except by defining a surface claim, including the croppings or point at which the vein is exposed, and the part of the vein located is determined by reference to the lines of the surface claim. These lines are fixed by the monuments on the ground, and they cannot be changed so as to interfere with other claims subsequently located." Referring then to the part of the statute relating to the records required by local rules, the opinion proceeds: "The requirements of the law as to what the record shall show are evidently designed to fix the locus of the claim in order to prevent floating. But the monuments defining the claim on the ground answer this purpose better than the record, and if they are to be erected in the beginning there can be but little use ever to make a record; and in fact it is not made obligatory by law. * * * All that is decided upon this point is that under the law of congress, unaided by any supplementary miners' rules, there is no means of locating a quartz vein except by marking out surface lines, and that, when these lines have been marked, they cannot be changed so as to take in ground that has been located by others prior to such attempted change."

In the Gleeson case this language is approved, and the court further says: "The vein is the principal thing in the sense that it is for the sake of the vein that the location is made. The surface is of no value without it. No location can be made until a vein has been discovered within its limits, and the surface must, or at least ought to, be located in conformity with the course of the vein. Rev. St. 2320. But the location is of a piece of land including the vein. * * * This section alone shows that it is a surface parallelogram not less than fifty feet in width that must be located. But the purpose of the law is more clearly indicated by the granting clause. * * * The vein originally discovered, and for the sake of which the location is made, is lumped in with other mineral deposits that may happen to exist within the limits of the surface claim, and no part of it is granted except that part the top or apex of which lies inside the surface lines extending downward vertically. This, it would seem, ought to be conclusive, but the language of section 2325

is, if possible, still more convincing: 'A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes,' may by taking the prescribed steps obtain the title upon payment of five dollars per acre for the land. Thus it appears that a location must be made by taking up 'a piece of land' to include it. No other means are provided." As to the object and policy of the statute the court says: "Before the statute he could claim no more than 400 feet of the vein, and of that he was not secure for a day. The moment he developed rich ore he was beset by trespassers, and, in order to enjoin them from stealing his property, was obliged to trace the vein between them and the location point. He was harassed with litigation, and his means often entirely consumed in the prosecution of work not necessary to the development of his mine, but essential for the vindication of his title. Under the new law this source of vexation and expense is entirely swept away. Within his surface lines the discoverer of a vein is secure. * * * Sound policy, therefore, concurs with the language of the statute in sustaining our conclusion that a vein can only be located by means of a surface claim. * * * The object of the law in requiring the location to be marked on the ground is to fix the claim, to prevent floating or swinging, so that those who in good faith are looking for unoccupied ground in the vicinity of previous locations may be enabled to ascertain exactly what has been appropriated in order to make their locations upon the residue."

These observations were made with reference to the rights of subsequent locators of adjoining ground against changes in the lines attempted by the first locators. But the point of the decision is that the rights of the parties are fixed by the lines marked on the ground when the location is made. If the lines so fixed protect subsequent locators against changes afterwards sought to be made by the first locator, they must be equally potent to protect the first locator against changes sought to be made against his interest by subsequent locators. The general principle that the location as made on the ground controls the rights of the parties is stated in the following cases: Iron S. M. Co. v. Elgin, etc., Co., 118 U. S. 207, 6 Sup. Ct. 1177, 30 L. Ed. 98; Watervale M. Co. v. Leach, 4 Ariz. 34, 33 Pac. 420; Wyoming Co. v. Champion Co. (C. C.), 63 Fed. 548; Mining Co. v. Tarbet, 98 U. S. 468, 25 L. Ed. 253; and Leadville Co. v. Fitzgerald, Fed. Cas. No. 8,158.

There are many cases which establish the doctrine that where the locator has marked his corners so that the side lines lie more than 300 feet from the apex of the vein as located by him at the time, or otherwise

marks a claim larger than the limits allowed by the statute, he cannot, as against a subsequent locator of adjoining ground, claim the excess, and that a court may adjudge that his side lines shall be "drawn in" to a position not more than 300 feet from the general course of the center line. McElligott v. Krogh, 151 Cal. 132, 90 Pac. 823; Howeth v. Sullenger, 113 Cal. 551, 45 Pac. 841; Southern Cal. R. Co. v. O'Donnell, 3 Cal. App. 386, 85 Pac. 932; Thompson v. Spray, 72 Cal. 533, 14 Pac. 182; English v. Johnson, 17 Cal. 118, 76 Am. Dec. 574; Hansen v. Fletcher, 10 Utah 266, 37 Pac. 480; Richmond v. Rose, 114 U. S. 576, 5 Sup. Ct. 1055, 29 L. Ed. 273. These and other cases to the same effect are cited by the plaintiff in support of the proposition that the side lines will be drawn in when the court, upon evidence taken and in the light of developments subsequent to the original location, ascertains that the locator mistook the actual location of the vein where it does not show upon the surface, and that the mining claim is always subject to change of position if new evidence or discoveries demonstrate that the vein is situated elsewhere than in the position it was supposed to occupy. None of them supports the proposition. In each the court assumed that by some mistake the side line or corner had been originally located too far from the place located as the apex of the vein, and the question involved and decided was the effect of such a mistake in measuring from the center stake or monument. For example, in McElligott v. Krogh, although it is not expressly so stated in the opinion, the fact was, as the record on file shows, that the court found that the true line of the vein and the line thereof as originally located were substantially identical. The question of the effect of a difference between the actual place of the apex and the original monuments set to locate it was not presented, and nothing said in the opinion can be taken as an expression of an opinion upon that question.

Of course, we do not here consider the effect of a fraudulent or intentional mislocation of the vein. The evidence shows that at the eastern end the vein did not appear upon the surface, and that the defendants erected the center monument at that end of the Lookout claim in good faith at the point where they believed the vein extended across the end line thereof. Upon the facts found and shown by the undisputed evidence, the court erred in giving to the plaintiff the ground included within the original limits of the Lookout location and embraced in the overlap of the Santa Ynez claim. We have assumed that the evidence is sufficient to show that the vein is situated off the located line as the findings declare. The appellants earnestly contended that the findings are without support in this particular. Our conclusion that the original monuments control makes it unnecessary to consider this question of the sufficiency of the evidence.

The findings that the Mountain View and Success locations were invalid are sustained by the evidence. The record does not set forth any substantial evidence of a discovery of valuable mineral within the lines of the claim. The defendants testified that there were seams of mineral upon the claim, but they did not state of what such mineral consisted. That term is too vague and general to justify this court in reversing a finding upon the theory that the witnesses intended to declare that the mineral in question was valuable and of a character that would support a mining location under the laws of the United States. A discovery of valuable mineral within the located boundaries is an essential prerequisite to a valid mineral location upon public lands of the United States. In addition to this defect, there was evidence that the boundaries of these claims were not marked upon the ground by any monuments, or at all. As to the Success mine, there was no evidence that any work was done upon the claim after the years 1897 and 1898. Under some circumstances, it would be necessary to plead the forfeiture to take advantage of such failure. But here the claim under the Success location was not mentioned in the pleadings of either party. Evidence concerning it, if admissible at all, was so only under the general issue upon the allegation of right and title. In this condition of the pleadings, evidence showing the forfeiture was admissible on behalf of the plaintiff, without express plea. Blood v. La Serena, etc., Co., 113 Cal. 229, 41 Pac. 1017, 45 Pac. 252.

It is further claimed that plaintiff made a binding agreement in parol with the defendants, whereby he is estopped to claim against them more than a one-third interest in that part of the Santa Ynez claim not included in the Lookout overlap. He never executed any written agreement to that effect. This contention of the defendants is based entirely upon a supposed estoppel by conduct. The question is not presented by the record, and cannot be considered. The pleadings make no allusion to it whatever, and there is no finding upon it. It is a well-established rule that, if a defendant relies on an *estoppel in pais* as a defense to the plaintiff's action, the facts constituting the estoppel must be specially pleaded. Di Nola v. Allison, 143 Cal. 115, 76 Pac. 976, 65 L. R. A. 419, 101 Am. St. Rep. 84; Newhall v. Hatch, 134 Cal. 273, 66 Pac. 266, 55 L. R. A. 673; Etcheborne v. Auzerais, 45 Cal. 121; Davis v. Davis, 26 Cal. 39, 85 Am. Dec. 157. We are not to be understood as intimating that the facts claimed to exist would have constituted such estoppel, even if they had been properly pleaded.

The judgment and order are reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.

HULL v. SANGAMON RIVER DRAINAGE DISTRICT.

[Supreme Court of Illinois, February 21, 1906.]

219 Ill. 454, 76 N. E. 701.

1. Petition for Drainage District—By Whom Signed.

Where a deed is signed and placed in escrow, the grantor is a proper party to sign a petition for a drainage district until such time as the deed takes effect.

2. Same—Tenant for Life.

A tenant for life who has also a contingent fee, together with children having a contingent remainder, are proper parties to sign petition for a drainage district.

3. Drainage District—Change of Boundaries.

Commissioners may change boundaries of a district from those given in the petition provided petitioners represent a majority of the adult landowners of the land therein situated and representing one-third of the area.

4. Constitutional Law—Drainage Districts—Jury Must Determine Damages.

Provisions of the Illinois Drainage Act, providing for the assessment of damages by a jury or by commissioners, are unconstitutional and void.

CASE NOTE.

Inclusion and Exclusion of Lands in District.

5. Same—Compensation Determined by Jury.

Compensation to be paid for land actually taken and damages to land not taken can only be determined by a jury, and after determining the just compensation for the land taken, the jury can only determine whether there is any damage to the lands not taken or how much the damage is by taking into account special benefits to the land.

6. Same—Method of Ascertaining Damages.

On the question of damages to lands not taken, the jury is bound to consider the effect of the improvement upon the land, both advantages and disadvantages, and for the purpose of reducing or balancing damages, defendant would necessarily take into account any special benefits.

7. Same—Benefits Not Assessed.

Such is not assessing benefits to the land, but merely ascertaining whether there is damage or not.

8. Same—Eminent Domain—Damages Cannot Be Fixed by Commissioners.

Commissioners cannot supplant a jury in determination of the question of damages, one of the questions necessarily involved in a proceeding under the Eminent Domain Act.

As to the legal character of drainage districts, see note to People ex rel. Chapman v. Sacramento Drainage District, *ante*, p. 107.

As to constitutional power to establish drains and drainage districts, see note to Chicago B. & Q. R. Co. v. Board of Supervisors of Appanoose County, *ante*, p. 459.

As to source of power legislative power to drain lands, see note to Coffman v. St. Frances Drainage District, p. ——, vol. 3, this series.

As to whether action in regard to drainage is legislative or judicial, see note to Smith v. Claussen Park Drainage & Levee District, p. —, vol. 2, this series.

As to notice required as due process of law, see note to Ross v. Board of Supervisors of Wright County, *ante*, p. 358.

As to public benefit and interest must be involved, see note to Campbell v. Youngson, p. ——, vol. 2, this series.

As to powers of commissioners, etc., see note to Seibert v. Lovell, *ante*, p. 261.

As to conclusiveness of decision of drainage commissioners and other officers, see note to Chapman & Dewey Land Co. v. Wilson, p. ——, vol. 2, this series.

As to collateral attack on drainage proceedings, see note to Chapman & Dewey Land Co. v. Wilson, p. ——, vol. 2, this series.

As to waiver of irregularities in drainage proceedings, see note to Smith v. Claussen Park Drainage & Levee District, p. ——, vol. 2, this series.

As to bonds of drainage districts, see note to Sisson v. Board of Supervisors of Buena Vista County, p. ——, vol. 3, this series.

For historical review of reclamation districts in California, see People ex rel. Chapman v. Sacramento Drainage Dist., *ante*, p. 107.

I. Swamp and Overflowed Lands.

A. Statutory Meaning.

Land unfit for cultivation in grain or other staple products by reason of the overflow is swamp and overflowed lands. Keeran v. Griffith, 31 Cal. 461 (1866).

If the land is such that regularly and annually after the subsidence of the water, a crop of either wheat, rye, barley, oats, corn, buckwheat, peas or beans could be successfully cultivated and produced, then the land is not rendered unfit for cultivation by reason of overflow. Keeran v. Allen, 33 Cal. 542 (1867).

The test is not whether any of the staple products may be cultivated and raised on the land, but whether such

9. Same—Assessment of Damages.

If commissioners can make an assessment of benefits to land a part of which is taken for public improvement, they can finally and conclusively determine a question which the owner has a constitutional right to have submitted to a jury.

10. Same—Commissioners May Assess Benefits.

If the owner makes no claim for damages to land, no part of which is taken in excess of benefits, commissioners may assess such benefits.

11. Same—Verdict as to Damages Not Conclusive as to Benefits.

Where a jury in eminent domain proceedings has found there were no damages to the land not taken, a verdict is not conclusive that there were no benefits.

12. Same—Assessment for Benefits—When Made by Commissioners.

It is only where no part of the land is taken, and the owner makes no claim for damages in excess of benefits, that assessment for benefits can be made by drainage commissioners.

products or some of them may be usually cultivated successfully. Thompson v. Thornton, 50 Cal. 142 (1875).

The phrase "swamp and overflowed" is the equivalent of the phrase "wet and unfit for cultivation," and therefore land that is too wet for cultivation is swamp and overflowed land, whether the water flows over or stands upon it. Miller v. Tobin, 18 Fed. 609 (1883).

Swamp lands, as distinguished from overflowed lands, may be considered such as require drainage to fit them for cultivation. Overflowed lands are those which are subject to such periodical or frequent overflows as to require levees or embankments to keep out the water and render them suitable for cultivation. San Francisco Savings Union v. Irwin, 28 Fed. 708 (1886).

The term "marsh or swamp lands" has a wider signification than the terms "marshes" or "swamps." The former means lands which by reason of their wet or marshy nature are incapable of successful cultivation. Land which, from its low and level character, may, from excessive rainfalls, retain at some seasons of the year sufficient water so that it is rendered incapable of cultivation, by reason of retaining in the soil or carrying on the surface an excessive quantity of water during certain portions of the year, even though at other times it may be high, firm and dry as lands in general. Campbell v. Youngson, p. ——, vol. 2, this series.

The word "overflowed" as applied to lands, does not apply to areas whose overflow is merely periodical or temporary, but has reference to a permanent condition of the lands to which it has applied. It has reference to those lands which are overflowed and will remain so without reclamation or drainage. McDade v. Bossier Levee Board, 109 La. 625, 33 So. 628 (1902).

II. Extent of District.

A. Determination of Is Legislative.

The determination of a territorial district to be taxed for local improvements is within the province of legislative discretion. Willard v. Presbury, 81 U. S. (14 Wall.) 676, 20 L. Ed. 719 (1871); Paulsen v. Portland, 149 U. S. 30, 13 Sup. Ct. 750, 37 L. Ed. 637 (1893).

The legislature has power to fix a district for itself, without any hearing as to benefits, for the purpose of assessing upon the lands within the district the cost of the local public improvement. Fallbrook Irrigation Dist. v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369 (1896); People ex rel. Chapman v. Sacramento Drainage District, 155 Cal. 373, 103 Pac. 207, *ante*, p. 107.

The question of what lands shall be included in a drainage district is legislative, and conclusions reached on the subject being within the scope of legislative power are not unlawful, because, like all legislative questions, the question may have been in some instance or to

Appeal from orders of county court organizing the Sangamon Drainage District and confirming an assessment of benefits against appellant's lands by the commissioners of the district. Judgment reversed and cause remanded.

For appellant—Rayburn & Buick.

For appellee—Wight & Alexander.

CARTWRIGHT, C. J. This is an appeal from orders of the County Court of McLean County, organizing the Sangamon River Drainage

some extent decided erroneously. Degravelle v. Iberia & St. Mary's Drainage Dist., 104 La. Ann. 103, 29 So. 302 (1901).

As to question of expediency of establishing drains being for the legislature, see note I, B, to Smith v. Claussen Park Drainage & Levee District, p. ——, vol. 2, this series.

As to necessity of notice of establishment of drain, see VII, note to Ross v. Board of Supervisors of Wright County, *ante*, p. 373.

As to establishment of drains being legislative act, see I, A, note to Smith v. Claussen Park Drainage & Levee District, p. ——, vol. 2, this series.

B. As Limited by Petition.

It is the confirmation of the report of the viewers that fixed the termini and route of the ditch, the extent of the excavations and work, and the assessments of benefits made against each tract. The termini, route, etc., set out in the petition for the drain are not binding upon the court or tribunal establishing drain or district. Chapman & Dewey Land Co. v. Wilson, p. ——, vol. 2, this series.

A petition for formation of drainage district cannot be expected to be exact as to description, as it is drawn prior to the survey and is merely a preliminary paper. If more land should be covered than described, the engineer must so recommend, and if less he should favor the elimination of part; and the fact that the petition represents that all land included therein is subject to overflow or too wet for cultivation when this is not so, will not deprive the board of jurisdiction. Zinser v. Board of Supervisors of Buena Vista County, 137 Iowa 660, 114 N. W. 51 (1907).

The Iowa Statute does not contemplate that the petition must specifically describe all lands to be included within the district. This is to be determined after the engineer's report is made. Mackay v. Hancock County, 137 Iowa 88, 114 N. W. 552 (1908).

Under the New Jersey Statute only lands described in the report and notice are liable to assessment. In the Matter of Drainage along Pequest River, 39 N. J. L. (10 Vr.) 197 (1877).

Only lands described in the application for appointment of commissioners and proceedings for establishment of drains, etc., are liable for assessment. Matter of Drainage of Great Meadows and Pequest River, 42 N. J. L. (13 Vr.) 553 (1880).

An order of court establishing a drainage district is not final as to lands not included, and does not preclude them being added to it. Streuter v. Willow Creek Drainage Dist., etc., 72 Ill. App. 561 (1897).

C. Changing Boundaries.

The original petition is not for the purpose of making a final location of

District, in said county, and confirming an assessment of benefits against appellant's lands by the commissioners of said district. The proceeding was commenced by filing a petition for the organization of the district under what is commonly known as the Levee Act (2 Starr & C. Ann. St. 1896, p. 1500, c. 42, par. 29). Commissioners were appointed by the court, and they examined the lands proposed to be drained, and over and upon which the work was proposed to be constructed, and made a report, as required by section 9 of the Act (paragraph 37), recommending the organization of the district. Appellant filed objections to the report, and his objections were overruled.

the ditch. The viewers have a right to vary the same, and all proceedings are of an *ex parte* character until the report of the viewers is made and filed. Chapman & Dewey Land Co. v. Wilson, p. ——, vol. 2, this series.

Commissioners may change the boundaries from those given in the petition so as to exclude certain of the lands or include others. Gauen v. Moredock & Ivy Landing Drainage Dist., 131 Ill. 446, 23 N. E. 633 (1890); Barnes v. Drainage Com'rs, 221 Ill. 627, 77 N. E. 1124 (1906); Doyle v. Baughman, 24 Ill. App. 614, (1886).

Under the Illinois Statute, drainage commissioners may change boundaries from those given in the petition so long as they have the requisite number of petitioners representing the requisite amount of land, and are not required to include all the land benefited if the effect would be to leave the petition without requisite signatures or amount of land. Hull v. Sangamon River Drainage District, principal case.

In the absence of a statutory provision, commissioners of a drainage district have no authority to change its boundaries after it is once organized. People v. Drainage Commissioners, 61 Ill. App. 416 (1895).

Where a district is enlarged, the same notice should be given as is required upon its original creation. Commissioners M. & T. Special Drainage Dist. v. Griffin, 134 Ill. 330, 25 N. E. 995 (1890).

A petition need not be amended nor need affidavits be made on such change of boundaries. Lees v. Drainage Com'rs., 125 Ill. 47, 16 N. E. 915 (1888).

Under the Michigan Statute, the board of review may add new lands to the district as found by the commissioners. Murphy v. Dobben, 137 Mich. 565, 100 N. W. 891 (1904).

As to action of commissioners in adding land being *quasi* judicial, see note II, G, to Smith v. Claussen Park Drainage & Levee District, p. ——, vol. 2, this series.

D. Not Restricted to Established Subdivisions.

Where the Constitution does not prohibit it, it is within the power of the general assembly to authorize the formation of sanitary districts, disregarding existence and boundaries of pre-existing municipal corporations, and invest their corporate authorities with powers of taxation for sanitary purposes. People ex rel. Wilson v. Salomon, 51 Ill. 37 (1869); Wilson v. Board of Trustees of Sanitary Dist. of Chicago, 133 Ill. 443, 27 N. E. 203 (1890).

Where highway commissioners are also drainage commissioners they do not act in respect of the drainage district as highway commissioners, in which capacity their jurisdiction would necessarily be confined to the township, but as drainage commissioners, and it is not requisite that the political subdivision in which they are elected should be coincident with the boundaries of the drainage

It is further contended that the court erred in overruling the objections and in not dismissing the petition, for the reason that it was not signed by a majority of the adult owners of the land within the district and who represented one-third in area of the lands to be reclaimed or benefited. The petition was signed in the summer of 1903, and the hearing was in the fall of that year, and Mark Banks, one of the signers, was counted by the court as the owner of 160 acres of land. He had previously signed and acknowledged a deed of the land to Harrison Frink and Sheridan J. Frink, and had deposited the deed in the First National Bank of Bloomington, to be delivered on payment of the purchase price on or

district in which they discharge the functions of drainage commissioners. People v. Drainage Com'rs of Dist. No. 1 of Town of Young America, 143 Ill. 417, 32 N. E. 688 (1892); Kilgour v. Drainage Com'rs, 111 Ill. 342 (1884).

An act to provide for the construction, maintenance, and repair of drains and ditches by special assessments on the property benefited thereby, and providing that county commissioners in counties not under township organization shall be drainage commissioners in and for their respective counties, does not contravene the provision of Constitution prohibiting the general assembly from appointing or electing any person to office, as no office is created, but merely additional duties imposed upon county commissioners. Owners of Lands v. People ex rel. Stookey, 113 Ill. 296 (1885).

The commissioners of a drainage district situated in more than one township and selected from highway commissioners of the different townships, have power to enlarge the district under the Illinois Law. In doing so they do not act as highway commissioners, but as drainage commissioners only, as officers of a distinct municipal corporation from that in which they act as highway commissioners, and there is no force to the objection that their jurisdiction is limited to the territory of the municipal corporation in which they are elected highway commissioners. Davenport v. Commissioners of Drainage Dist., 25 Ill. App. 92 (1886).

In providing for local improvements such as drainage districts, the court is not restricted to the established political subdivisions of the state, such as counties, townships, etc., but may provide any district or extent of territory less than the whole state. Alcorn v. Hamer, 38 Miss. 652 (1860).

E. Boundaries Must Be Certain.

The limits and boundaries of a district must be fixed with certainty and precision, especially where the district is empowered to levy a property tax and when the tax must be voted for. Unless the limits are thus fixed it is not possible to know with certainty what property is taxable and what persons may participate in election, and unless these limits are so fixed the organization of the district is void. Richards v. Cypremort Drainage Dist., 107 La. 657, 32 So. 27 (1901).

Where the boundaries and limits of a district are not fixed with certainty any landowner may question the legality of the district, although his land in any event is included therein, as he cannot say what land is to share with his in the payment of assessments. Richard v. Cypremort Drainage Dist., 107 La. 657, 32 So. 27 (1901).

To every legal assessment there must be an assessing district, and this must be known and designated before the

before February 15, 1904, and in case of such payment he was to deliver possession on or before March 1, 1904. The deed placed in escrow conveyed nothing until the conditions for its delivery were performed on February 15, 1904, when it was delivered to the grantees. Leiter v. Pike, 127 Ill. 287, 20 N. E. 23. The title did not pass out of Mark Banks until the deed took effect and the grantees became the owners of the land, and he was properly counted as an owner.

There was an 80-acre tract which had belonged to James R. Cundiff, who had died leaving a widow, Sarah Cundiff, and an only son, Isaac. By his will James R. Cundiff devised said land to his widow for

assessment can be apportioned and the burden imposed. It cannot be left in the discretion of the assessing officer to enlarge or contract at his will, to include within it or exclude from it lands at his discretion, at the time he lays the burden. Kinnie v. Bare, 68 Mich. 625, 36 N. W. 672 (1888).

F. Presumed Land Properly Included.

Where a district is organized after due notice to owners of land, it must be presumed that land was properly included within its limits. Reclamation Dist. No. 531 v. Phillips, 108 Cal. 306, 39 Pac. 630, 41 Pac. 335 (1895); Com'rs of Highway v. Drainage Dist., 127 Ill. 581, 21 N. E. 206 (1889); Roby v. Shunganunga Drainage Dist., 77 Kan. 754, 95 Pac. 399 (1908).

G. Boundaries Fixed by Owners.

The formation of a reclamation district the boundaries of which are fixed by county commissioners upon the majority vote of the property owners of the district, is not in contravention of any constitutional provision, and does not contemplate or permit the furtherance of private interests. State ex rel. Harris v. Hanson, 80 Neb. 724, 115 N. W. 294 (1908).

H. Boundaries Cannot be Changed after Organization.

In the absence of statutory provision the commissioners of drainage district have no power to change its boundaries after it is fully organized, and have no power to make such change under a statute authorizing the dissolution of the district. People ex rel. Bollweg v. Drainage Com'rs of Union Drainage Dist. No. 1, 165 Ill. 156, 46 N. E. 261 (1896); People v. Drainage Com'rs, 61 Ill. App. 416, affirmed 165 Ill. 156 (1895).

I. Extending Boundaries.

Jurisdiction may be granted commissioners to enlarge district by adding lands thereto. Scott v. People ex rel. Lewis, 120 Ill. 129, 11 N. E. 408 (1887); Lees v. Drainage Com'rs, 24 Ill. App. 487 (1887).

The legislature may extend or change the boundaries of a district or grant power to commissioners so to do, and grant jurisdiction to the commissioners over the district as so extended. People v. Drainage Com'rs, 143 Ill. 417, 32 N. E. 688 (1892).

Where several parcels of land are sought to be annexed to a reclamation district the whole proceeding is not void because void as to certain parts, by reason of insufficient description thereof. People ex rel. Herman v. Commissioners of Bug River Special Drainage Dist., 189 Ill. 55, 59 N. E. 605 (1901).

Under the statute providing for annexation to district of lands benefited, but lying outside its borders, it is immaterial whether they were left out of the original district by mistake or accident, or whether the benefits were not and could not have been anticipated. The question

life, and she died before the petition was signed. After her death the land was devised to the son Isaac Cundiff, for life, with remainder in fee at his death to his children who should be living at that time, and if any child of Isaac should die in his lifetime leaving a child or children, such child or children who might be living at the time of Isaac's death was to have the share that would have gone to the parent. Isaac Cundiff had six children, of whom four were adults and two were minors. He and the adult children signed the petition. We do not care to construe the will in this collateral way, since, in any view of its provisions, the petition was sufficient. Isaac Cundiff, who signed the petition, had a

is, are they or will they be benefited? If so, they should be annexed and share in bearing the burden imposed as well as in reaping the benefits gained. Streuter v. Willow Drainage Dist., 72 Ill. App. 561 (1897).

A decree establishing a drainage district adjudicates only that the lands included within it will be benefited thereby and not that land thereafter sought to be included or added to district would not be benefited, and is therefore not a bar to afterwards including other lands. Streuter v. Willow Drainage Dist., 72 Ill. App. 561 (1897).

As to division of tract for assessment see XIX, note to Seibert v. Lovell, *ante*, p. 268.

As to notice of proceedings to add land to districts, see VII, note to Ross v. Board of Supervisors of Wright County, *ante*, p. 373.

As to reclamation conferring public benefit, see VI, note to Campbell v. Youngson, p. ——, vol. 2, this series.

As to various questions and examples of what facts, conditions, and circumstances justify including lands in or excluding them from district, see III-VI, note to Coffman v. St. Frances Drainage District, p. ——, vol. 3, this series.

III. Including Land in Several Districts.

A. Including in More than One District.

That lands are included within a drainage district organized under one act does not preclude their being attached to a district organized under another act. The only conditions required are that the lands are connected with the district to which they are to be attached by ditches or drains or that they are or will be benefited by the work of that district. Allman v. Lumsden, 55 Ill. App. 21 (1893).

In the absence of a statutory prohibition there is no restriction as to the overlapping of drainage districts. The land included within such can only be assessed for and to the extent of the benefits actually bestowed by virtue of improvements made by any particular district. Assessments can only be laid after notice, and if the levy is not supported by the fact the landowner has ample remedy by appeal to the courts. State ex rel. Sheffer v. Fuller, 83 Neb. 784, 120 N. W. 495 (1909).

B. Subdistricts.

New and independent drainage district may, under Illinois Statute, be created, organized, and maintained within the limits and boundaries of another district before then created, organized, maintained, and in full operation. People ex rel. Pollard v. Swigert, 130 Ill. 608, 22 N. E. 787 (1889); People ex rel. Miller v. Scott, 132 Ill. 427, 23 N. E. 1119 (1890).

After land has been properly included within a drainage district and assessed for a ditch, furnishing general opportunities for the drainage of the land in

life estate in the land, and was also the only heir at law of the testator, and if his children had no present estate, the fee after the life estate was in him as heir at law to wait the contingency upon which the remainder was to vest; and if the children had a present estate, the adults who signed the petition represented four-sixths of the remainder combined with the life estate. The petition fulfilled the requirements of the statute.

The commissioners reported that the proposed district did not embrace all the lands that would be benefited, and that a very large area of additional lands, of which they gave the descriptions and names of the owners, would be benefited. They enlarged the district so as to include

that entire district, a subdistrict may be formed, the land included within it being subjected to an additional assessment on account of the facilities afforded for drainage into the larger ditch, and in such event there would be no double assessment, as the land would not be assessed twice for the same improvement, but for two separate improvements, each of which is beneficial. In re Hay Drainage Dist. No. 23, Hampe v. Hamilton County, 146 Iowa 280, 125 N. W. 225 (1910).

As to notice of formation of subdistrict, see IX, note to Ross v. Board of Supervisors Wright Co., *ante*, p. 375.

IV. Lands Which May Be Included or Excluded.

A. Source of Title Immaterial.

It is the character of the land and its susceptibility of being reclaimed under one system of works and not the source of title which authorizes action by the state. Hagar v. Reclamation District No. 108, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569 (1883).

Where swamps granted the state by the United States have passed into private ownership, they are as liable to assessment for reclamation purposes as any other lands, no exemption being found in the donation act of congress. Ritter v. Drainage Dist. No. 1 of Poinsett County, 78 Ark. 580, 94 S. W. 711 (1906).

In providing for the reclamation of swamp and overflowed lands, the legislature is not restricted to lands acquired from the United States under the Arkansas Act, but may include all swamp and overflowed lands as well as those acquired by grants from the Mexican Government as otherwise. Hagar v. Board of Supervisors of Yolo County, 47 Cal. 222 (1874); Hagar v. Reclamation District No. 108, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569 (1883); Reclamation Dist. No. 108 v. Hagar, 4 Fed. 366 (1880); People ex rel. Chapman v. Sacramento Drainage District, 155 Cal. 373, 103 Pac. 207, *ante*, p. 107.

B. Public Lands.

Assessment may be apportioned to public (school) as well as private lands. Although the public land could not be sold for payment of the assessment, the state must make some other provision for the payment of the benefit received by the public lands. State ex rel. Latimer v. Henry, 28 Wash. 38, 68 Pac. 368 (1902)

C. Lands Uncovered by Receding of Lakes.

The legislature may provide for the sale of lands uncovered by the receding or drainage of the waters of inland lakes, etc., and if subject to periodical overflow, may form the same into reclamation districts. McCord v. Slavin, 143 Cal. 325, 78 Pac. 1104 (1904).

part of the lands, which would not have the effect of so far enlarging the district that the petitioners would no longer constitute a majority of the adult landowners nor represent less than one-third of its area, but they did not include 4,248 acres which would be benefited by the proposed work, for the reason that there would not be the requisite number of petitioners. Appellant contends that the petitioners had no power to enlarge the district by including a part only of the lands that would be benefited, and that the court had no right to organize a district including less than all the lands that would be so benefited. Section 12 of the Act (paragraph 40) authorizes the commissioners to alter the

D. In More than One County.

Lands situated in ten different counties may all be joined in one district. People ex rel. Chapman v. Sacramento Drainage District, 155 Cal. 373, 103 Pac. 207, *ante*, p. 107.

Where a statute provides for the formation into a drainage district of land to be benefited thereby situated in two different counties, and of the land sought to be formed into such district that situated in one county will receive no benefit, the district cannot be formed. Beasley v. Gravitte, 86 Ark. 115, 110 S. W. 1053 (1908).

A drainage district may construct drains or ditches existing and having their outlet outside of the county in which it is formed and in which the lands comprising it are situated. Beasley v. Gravitte, 86 Ark. 115, 110 S. W. 1053 (1908).

The legislature can confer on the board of supervisors of one county the power to include within a district lands within another county. Reclamation Dist. No. 108 v. Hagar, 66 Cal. 54, 4 Pac. 945 (1884).

Where lands to be drained are situated in two different counties, the legislature may confer jurisdiction upon the court of the county where the petition is filed and where a portion of the land is situated. Shaw v. State of Indiana ex rel. Whitmore, 97 Ind. 23 (1884); Crist v. State ex rel. Whitmore, 97 Ind. 389 (1884); Buchanan v. Rader, 97 Ind. 605 (1884).

Where a district extends over two counties the circuit court of either has jurisdiction to review acts of commissioners in enlarging the district. Com'rs of Mason & Tazewell Special Drainage Dist. v. Griffin, 28 Ill. App. 561 (1887).

E. Requiring Distinct Systems of Drainage.

Where four different ditches or systems of drainage are required to drain a certain territory, each of which, independent of the others, will drain a certain distinct part thereof, the whole cannot be included in one district. Klinger v. People ex rel. Hughes, 130 Ill. 509, 22 N. E. 600 (1889).

F. Public Highways.

The legislature has power to include public highways in drainage districts, and to authorize the commissioners in such districts to cut ditches and to enlarge water courses across such highways when necessary for drainage purposes, and to apportion to the road authorities, according to benefits, their due proportion of the cost and expense of the drainage work. Heffner v. Cass & Morgan Counties, 103 Ill. 439, 62 N. E. 201, 58 L. R. A. 353 (1901).

By the Indiana Law, townships may be assessed for benefits to highways by drains and drainage. Young v. Wells, 97 Ind. 410 (1884); Grimes v. Coe, 102 Ind. 406, 1 N. E. 735 (1885).

It does not follow that because the court's assessment of benefits has been

boundaries by extending or contracting them so as to include lands that will be benefited and exclude lands that will not be benefited, provided that the alteration of the boundaries shall not have the effect of so far enlarging or contracting the district that the petitioners will not any longer constitute a majority of the adult landowners of the land therein situated or represent one-third of the area. The change in the boundary of this district was in accordance with that statute. The proviso to section 12 fixed a limit beyond which the commissioners could not go in enlarging the district, and the court did not err in overruling the objection.

made against the owners of certain lands and because they in common with others of the taxing district contribute to the improvement of the highways by the payment of road tax, that they are thereby taxed twice for a public improvement from which they derive no special benefit. In cases where benefits are assessed against a highway for construction of a drain, the assessments of benefits upon the lands found to be benefited by construction of the drain are not paid for the purpose of improving the highway, they are made upon the theory that each tract of land assessed receives a peculiar and special benefit and is increased in value by the construction of the improvement to an amount equal to the sum assessed against it. The landowner simply pays toward the construction of the work a sum equal to the benefits which accrue to his own land. The law simply coerces him to contribute toward the improvement of his own property because the public good is involved in the enterprise. He pays no more toward the public use than does another citizen of the township. Heick v. Voight, 110 Ind. 279, 11 N. E. 306 (1887).

G. Municipal Corporations and Parts Thereof.

Commissioners of drainage have no lawful authority to build drains within the limits of a city either in whole or in part, as the city has the exclusive power of drainage within its limits. Anderson v. Endicutt, 101 Ind. 539 (1884).

Anderson v. Endicutt, 101 Ind. 539, (1884), holding that cities had exclusive jurisdiction of the matter of drainage within their limits, and that there was no authority for the construction of drains in cities by drainage commissioners under the direction of the circuit court, was decided with reference to an Act of 1881. By Act of 1885 it is provided that any owner or owners of any separate and distinct tract or tracts of lands lying outside the corporate limits of any city or town which would be benefited by drainage, and which cannot be accomplished without extraordinary labor and expense as determined by the court, etc., and which cannot be accomplished in the best and cheapest manner without passing through the corporate limits of such city or town, may apply for such drainage by petition to the court. The latter act is not void, as the legislature has power to give the circuit courts jurisdiction over drains that would extend through cities and towns, and within the legislative discretion, to lodge jurisdiction in this subject of drainage in country and city conjointly where it saw fit. Sauntman v. Maxwell, 154 Ind. 114, 54 N. E. 397 (1899).

Under the statutes of Illinois, where a city or village has not organized its territory into drainage districts, it may be included within and as a part of a drainage district organized under the Farm Drainage Act. People ex rel.

Appellant owned two hundred acres of land in the district, and the proposed ditch was to run across his land, so that a part would be actually taken for the ditch. The court directed the commissioners to go upon the lands of the district and make assessments of benefits and damages, or benefits, in the manner provided by law, and to make a report to the court. The commissioners took an oath that they would, to the best of their ability, make assessments of damages and benefits, or benefits, as the case might be, and made a report, accompanied by an assessment roll, in which they assessed against a 40-acre tract of appellant $83.40 and against a tract of 160 acres $551.12 for benefits. The commissioners

Smeardon v. Crews, 245 Ill. 318, 92 N. E. 245 (1910).

Under the statutes of Illinois, parts of an incorporated city may be included within a drainage district. People ex rel. Scheuber v. Nibbe, 50 Ill. 269, 37 N. E. 217 (1894); City of Joliet v. Spring Creek Drainage Dist., 222 Ill. 441, 78 N. E. 836 (1906); People ex rel. Heise v. Monroe, 227 Ill. 604, 81 N. E. 704 (1907).

Where an incorporated village is unlawfully included within a district, the same must be excluded leaving the district in other respects unaffected. *Dictum.* People ex rel. Samuell v. Cooper, 139 Ill. 461, 29 N. E. 872 (1891).

Under a law authorizing the board of supervisors of counties to construct ditches or drains whenever the same will be conducive to the public health, convenience, or welfare, they are not restricted to such parts of the county as lie without municipal corporations, such power not having been conferred on incorporated towns and as its exercise is not repugnant to any of the powers granted to such corporations. Aldrich v. Paine, 106 Iowa 461, 76 N. W. 812 (1898).

In the absence of constitutional restriction, a drainage district may be created to include a city or town or part of a city or town. The efficiency of drainage would be greatly impaired if the powers of the governing board were limited to lines of existing governmental subdivisions. Roby v. Shunganunga Drainage Dist., 77 Kan. 754, 95 Pac. 399 (1908).

Commissioners of drainage districts have no power to annex thereto the streets and alleys of cities and towns which have connected with its ditches or drains. Drainage Com'rs of Dist. No. 1 v. Village of Cerro Gordo, 217 Ill. 488, 75 N. E. 516 (1905).

Two municipalities cannot exercise jurisdiction over the same territory for the same purpose at the same time, and where a city has assumed jurisdiction over part of a creek or ditch within its corporate limits, that jurisdiction, for the use to which it has been put by the city, is exclusive. If parties who have the right to have the water falling upon their land flow off through said creek or ditch, desire increased drainage facilities, they must find them other than in the Illinois Act of 1901, providing that where two or more parties owning lands which require a combined system of drainage have by voluntary action constructed ditches which form a continuous line or lines and branches, the several parties shall be liable for their just proportion of repairs, etc., and providing for the formation of a district to include all lands benefited by such ditches when repairs are not voluntarily made, they cannot include the city in such a district as the ditches and outlets of the city which have been constructed and improved by special assessment cannot be said to have been voluntarily

reported that they had disregarded all damages that would be sustained by the lands, both damages to land that would be taken and damages to land that would not be taken, because they had been advised that they had no right, power, or authority, under the law, to fix damages or award compensation, but that it was their intention, after the assessment of benefits had been confirmed, to begin proceedings under the eminent domain act to condemn the right of way over the lands of owners with whom they could not agree. Appellant objected to the assessment, specifying as the principal ground that the commissioners had no power or authority to make the assessment, but his objections were

made. Bishop v. People, 200 Ill. 33, 65 N. E. 421 (1902).

H. Railroad Rights of Way.

The state has an undoubted right to authorize the improving of a drain across the right of way of a railroad company by deepening and widening a natural channel, and such act is not a violation of the State or Federal Constitution. Lake Erie & W. R. Co. v. Cluggish, 143 Ind. 347, 42 N. E. 743 (1896); Baltimore & O. S. W. R. Co. v. Board of Com'rs of Jackson County, 156 Ind. 260, 58 N. E. 837, 59 N. E. 856 (1900); Pittsburg C. C. & St. L. R. Co. v. Machler, 158 Ind. 159, 63 N. E. 210 (1902).

A statute providing that a railroad company shall make a ditch or channel determined upon for drainage purposes across its right of way, the expense thereof being allowed the company as its damages, but that it shall be allowed no damages on account of bridging, is not unconstitutional. Ross v. Board of Supervisors of Wright County, 128 Iowa 427, 104 N. W. 503, 1 L. R. A. *ante*, p. 358; Sisson v. Board of Supervisors of Buena Vista County, 128 Iowa 442, 104 N. W. 454, p. ——, vol. 3, this series; Chicago, B. & Q. R. Co. v. Board of Supervisors of Appanoose County, 170 Fed. 665, *ante*, p. 459.

The rights of a railroad company to bridge over a natural water course crossing its right of way are not superior to those of the public to use the water course for draining lands. Chicago, B. & Q. R. Co. v. People ex rel. Drainage Com'rs, 200 U. S. 561, 26 Sup. Ct. 561, 50 L. Ed. 596 (1906); Chicago, B. & Q. R. Co. v. Board of Supervisors Appanoose County, 170 Fed. 665, *ante*, p. 459.

I. Lands Naturally Drained.

Lands so situated that waters thereon from falling rains and melting snows or from natural springs naturally drain into a swale and that are no better drained by a ditch constructed to drain the swale than they were by the swale itself, should not be assessed for the construction of the ditch or its improvement, as where lands are so situated the lower tenement is under a natural servitude to receive such waters as flow to or upon it from the higher one, provided the industry of man has not been used to create the servitude. It is an incident to the higher tenement and a part of the property of the owner in it. It is not the rain that falls on the land that determines its need of drainage but the amount that falls on it for which artificial drainage is needed, and where there is no necessity of this, there can be no ground for an assessment for the purposes of drainage however much rain may fall upon it, and there is no principle of justice upon which others less favorably situated can compel the owner to contribute towards the making of other lands as good as his in the matter of drainage. Blue v.

overruled. The commissioners then sat as a jury by direction of the court, against the objection of the appellant, for the hearing of objections, and rendered a verdict confirming their assessment as made, without modification, amendment, or correction.

It is conceded that the commissioners had no power to assess damages, and they so stated in their report; but it is contended that they could assess benefits to appellant's lands and try the question of compensation and damages before a jury, or, in other words, that they could try the part of a condemnation case involving benefits and have a jury try the other part involving damages, and have two verdicts. The

Wentz, 54 Ohio St. 247, 43 N. E. 493 (1896).

There is no power to assess land for benefits conferred by nature, such as drainage thereof by a natural water course where they will be in no wise benefited by the proposed improvement, such as increasing the outlet of natural water course and preventing the flow of water upon riparian lands below those proposed to be so assessed. Mason v. Fulton County Com'rs, 80 Ohio St. 151, 88 N. E. 401, 131 Am. St. Rep. 689, 24 L. R. A. (N. S.) 903 (1909).

A prerequisite to the inclusion of any tract of land in a drainage district is that it will in all reasonable probability derive some special benefit from the improvement. If, owing to its location, the construction of a ditch will not drain the land any more or differently than is done by the existing swale or swamp, or render it more accessible, or affect its immediate surroundings, then it is not benefited, even though the ditch may carry off the water. Zinser v. Board of Supervisors of Buena Vista County, 137 Iowa 660, 114 N. W. 51 (1907).

If land is so located that drainage will not benefit it or so that it will drain quite as well in the lowlands or sloughs as it will with the ditch excavated, and it is not made more accessible or the like, then it is not benefited within the meaning of the statute. In other words there can be no assessment on lands merely because of the improvement of others near by. The land itself or its immediate surroundings must be affected by the improvement in order to justify its inclusion in the drainage district. Zinser v. Board of Supervisors of Buena Vista County, 137 Iowa 660, 114 N. W. 51 (1907).

As to lands drained by nature not being specially benefited, see XIII, note to Campbell v. Youngson, p. ——, vol. 2, this series.

J. Lands Partially Drained.

That the proposed improvement is not sufficient to completely drain certain land is not a sufficient basis to say no benefit will be received or to exclude that land in the formation of a drainage district. Schropfer v. Hamilton County, 147 Iowa 63, 125 N. W. 992 (1910).

Where lands sought to be included in a drainage district have been partially drained, but not to such extent as to prevent the overflow and standing of waters thereon, they may be included within such district if the effect thereof will be to benefit the lands and prevent or decrease the overflow or water thereon. Comm'rs of Spoon River Drainage Dist. in Champaign County v. Connor, 121 Ill. App. 450 (1905).

K. High and Dry Lands.

Lands benefited may be included within a district although they are not actually swamp or overflowed. The test is whether they will be benefited by the formation of the district. Keel v. Board of Directors of St. Francis Levee Dist., 59 Ark. 513, 27 S. W. 590 (1894).

provisions of this drainage act for assessing damages by a jury or commissioners are unconstitutional and void. Michigan Central R. Co. v. Spring Creek Drainage Dist., 215 Ill. 501, 74 N. E. 696. The compensation to be paid for land actually taken and damages to lands not taken can only be determined by a jury. When a jury is impaneled for that purpose, after ascertaining the just compensation for land taken, they can only determine whether there is any damage to the lands not taken, or how much the damage is, by taking into account special benefits to the land. On the question of damages to lands not taken, the jury would be bound to consider the effect of the improvement upon the land, both

Lands which are not swamp or overflowed may be assessed for drainage if they receive a special, although indirect, benefit from the drainage. Spear v. Drainage Com'rs, 113 Ill. 632 (1885); Chambliss v. Johnson, 77 Iowa 611, 42 N. W. 427 (1889).

L. Dominant and Servient Lands.

Lands benefited by the work of a drainage district are subject to be attached thereto without regard to their natural conditions and without regard to whether they are dominant or servient to the lands of the district. Comm'rs of Spoon River Drainage Dist. in Champaign County v. Connor, 121 Ill. App. 450 (1905).

M. Lands Majority of Which Are Drained.

The law providing for including in a district certain land the majority of which will be benefited by the proposed improvement, is constitutional. Lewis County v. Gordon, 20 Wash. 80, 54 Pac. 779 (1898); Northern Pacific R. Co. v. Pierce County, 51 Wash. 12, 97 Pac. 1099, 23 L. R. A. (N. S.) 286 (1908).

V. Illinois Statutes.

A. By Connecting with Ditch.

Under the Illinois Statute that landowners who connect with drains of a district, shall be deemed to voluntarily apply to be included in the district, and their lands benefited by such drainage shall be treated, classified, and taxed like other lands within the district, the connection on the part of a landowner is an admission that he needed such drains for outlet, and the duty of the commissioners does not depend upon their judgment as to whether the lands so connected do or do not require for outlet the drains of the district. It is their duty to treat him as a voluntary applicant to be included in the district, and to classify and tax his lands benefited by the drainage accordingly. Commissioners of Lake Fork Special Drainage Dist. v. People ex rel. Bodman, 138 Ill. 87, 27 N. E. 857 (1891).

And the same rule applies where one drainage district connects with the drains of another district,—the district so connecting may be assessed for the benefits which it receives thereby. Drainage Com'rs of Dist. No. 1 of the Town of Young America v. Drainage Com'rs of Dist. No. 7 of the Town of Shiloh, 91 Ill. App. 241 (1900).

A judgment excluding certain lands upon the formation of a drainage district is no bar to their being afterwards annexed under this statute. People ex rel. Herman v. Commissioners of Bug River Special Drainage Dist., 189 Ill. 55, 59 N. E. 605 (1901).

And under the statute it is not necessary that any affirmative act be done by owners of land to be so added to district, as the statute provides their consent. Streuter v. Willow Drainage Dist., 72 Ill. App. 561 (1897).

advantages and disadvantages, and for the purpose of reducing or balancing damages would necessarily take into account any special benefits. That is not assessing benefits to the land, but is merely ascertaining whether there is damage or not. Page v. Chicago, M. & St. P. R. Co., 70 Ill. 324. Where commissioners set down damages and benefits, and carry the balance forward as damages or benefits, the only final conclusion is that there are damages, or are benefits, and the figures only show how the result was arrived at. Manifestly the commissioners cannot supplant a jury in the determination of one of the questions which is necessarily involved in a proceeding under the eminent

Where a landowner has connected with a drain, and thereby, under Illinois Statute, is deemed to have made voluntary application to be included in the district, he is not entitled to notice of the action of the commissioners in annexing his land to the district. People v. Drainage Comm'rs of Dist. No. 1 of Town of Young America, 143 Ill. 417, 32 N. E. 688 (1892); Drainage Dist. No. 2 v. People ex rel. Baron, 147 Ill. 404, 35 N. E. 238 (1893).

While the owner of a dominant heritage has the right to collect the waters naturally flowing from the lands over the servient heritage into ditches and drains, and thus discharge them, yet when he connects his ditches with the ditches dug by a drainage district, the statute that one who so connects with such ditches is deemed to have voluntarily applied to have his land included within the district, takes effect. The mere fact of the right to have the waters flow over the lands below lying within the drainage district, gives no right to connect drains with the artificial drains of the district. People ex rel. Caldwell v. Commissioners of Wild Cat Drainage Dist., 181 Ill. 177, 54 N. E. 923 (1899).

It is only the landowner who connects with the ditches who, under the Illinois Statute, is thereby deemed to have voluntarily applied for admission into a drainage district, and his act cannot affect other landowners, although by means thereof their lands may also be drained. People ex rel. Phillips v. Drainage Dist. No. 5, 191 Ill. 623, 61 N. E. 381 (1901).

B. By Failure to Repair.

Under the statute providing that where two or more parties on adjoining lands which require a system of combined drainage have by voluntary action constructed ditches which form a continuous line or lines and branches, and where needed repairs and improvements are not made by voluntary agreement, any one or more parties owning parts of such ditch shall be competent to petition the commissioners of highways of the township for the formation of "a drainage district to include all the lands to be benefited" by maintaining these ditches, it is the intent of the act to include all lands that would be damaged by filling of the original ditch, and the commissioners appointed to determine this constitute the tribunal to decide what lands shall be included in the district. Barnes v. Drainage Commissioners, 221 Ill. 627, 77 N. E. 1124 (1906), affirming Barnes v. Drainage Commissioners, 123 Ill. App. 621 (1906).

Under such statute the commissioners are not restricted to lands described in the petition, but may exclude certain thereof and include other lands. They must determine what lands will be benefited or damaged, and include all benefited land in the district. Barnes v. Drainage Commissioners, 221 Ill. 627, 77 N. E. 1124 (1906).

domain act. If commissioners can make an assessment of benefits to lands a part of which is taken for a public improvement, they can finally and conclusively determine a question which the owner has a constitutional right to have submitted to a jury. As to lands no part of which is taken, if the owner makes no claim of damages in excess of benefits the commissioners may assess such benefits, and if a jury in an eminent domain proceeding has found that there were no damages to the remainder of the land, the verdict would not be conclusive that there were no benefits. City of Chicago v. Mecartney, 216 Ill. 377, 75 N. E. 117. In this case the commissioners under the orders of the court and against the objection of appellant, attempted to determine a question which appellant had a right to have submitted to a jury. The court erred in overruling the objections of appellant to such proceeding.

The judgment is reversed, and the cause remanded.

Reversed and remanded.

A ditch and its branches made by special assessment cannot be said to have been voluntarily made. Bishop v. People, 200 Ill. 33, 65 N. E. 421 (1902).

C. Levee Act and Farms Drainage Act Are Distinct.

The two acts of Illinois Legislature known as the Farm Drainage Act and the Levee Act are distinct. The provisions of one do not apply to proceedings taken under the other. Gauen v. Moredock & Ivy Landing Drainage Dist. No. 1, 131 Ill. 446, 23 N. E. 633 (1890); Union Drainage Dist. v. Volke, 163 Ill. 243, 45 N. E. 415 (1896).

As to using natural stream, see XVI, note to Seibert v. Lovell, *ante*, p. 267.

As to using old ditch, see XV, note to Seibert v. Lovell, *ante*, p. 267.

As to power to build levees or impound *debris*, see XVII, note to Seibert v. Lovell, *ante*, p. 267.

As to what facts and reasons justify the inclusion of lands in or the exclusion of them from districts, see note to Coffman v. St. Frances Drainage District, p. ——, vol. 3, this series.

As to collateral attack on formation of district, see II, A, note to Chapman & Dewey Land Co. v. Wilson, p. ——, vol. 2, this series.

GARNET DITCH & RESERVOIR COMPANY v. SAMPSON.

[Supreme Court of Colorado, February 7, 1910.]

48 Colo. 285, 110 Pac. 79, 1136.

1. **Waters and Water Courses—Reservoirs—Injuries from Bursting or Overflows—Statutory Liability Absolute.**

Under section 2272, Mills' Ann. St., the owners of reservoirs are liable for all damages arising from leakage or overflows of the waters thereof, and this liability is absolute and not dependent upon the question of care or negligence, and is not relieved by the fact that all that skill and foresight could have suggested to prevent the injury was done.

2. **Same—Use of Natural Hillside.**

The use of a natural hillside as part of the walls or construction of a reservoir does not affect the liability of the owners for the breaking or overflow thereof.

3. **Same—Damage by Act of God.**

Whether owner of reservoir may or may not, notwithstanding the statute, be excused from liability upon showing injury was caused by act of God, not decided.

4. **Statutory Law—Act Imposing Liability upon Reservoir Owners.**

Act making owners of reservoirs absolutely liable for all damage inflicted by bursting or overflow, is constitutional and valid.

5. **Same—Statutes—Exceptions.**

Where no exception is mentioned in a statute, it must be presumed none was intended, and the courts will not construe away the words of the statute by implying such exception.

6. **Same—Statutory Provisions—Repeal and Amendment.**

Section 2272, Mill's Ann. St., regarding liability for damage from leakage or overflow of reservoir, was not repealed by implication by Act of 1899, c. 126, the latter referring to reservoirs of certain capacity only and not relieving the owners from liability.

Action for damages occasioned by breaking of embankment or dam of reservoir, thereby flooding premises and destroying cattle. Judgment for plaintiff. Affirmed.

For appellant—Gondy & Twitchell, J. H. Burkhardt, King & Stewart, and Millard Fairlamb.

CASE NOTE.

Statutory Liability for Flooding Land Is Absolute.

The statute but reaffirms the common law that a person who for his own purpose brings on his own land and stores there anything likely to do mischief if it escapes, does so at his peril. Sylvester v. Jerome, 19 Colo. 128, 34 Pac. 760 (1893). But the liability here is based solely upon a construction of the statute. Garnet Ditch & Reservoir Co. v. Sampson, principal case.

The owners of reservoirs are insurers against damage from their breakage or overflow to the extent that negligence need not be alleged in an action for such

For appellee—Milton R. Welch.

As *amici curiae,* Cars. E. Herrington, R. H. Hart, E. N. Clark, J. G. Murray, L. W. Allen and Platt Rogers.

STEELE, C. J. The complaint charges that the defendant is a corporation of the state of Colorado, and was, upon the 11th day of April, 1903, and prior thereto, the owner in the possession of and operating a certain reservoir called the Bonnie Reservoir, situated on Dry Creek, in Montrose County; that water was stored therein by means of a dam across Dry Creek; that the embankment or dam burst, and the impounded water escaped with such force as to carry away and destroy a number of cattle that were pastured in the valley below.

The defendant admits that it had impounded a large quantity of water in its reservoir, but denies that the embankment or dam burst, and states that the hillside or mesa against which the dam abutted, broke "by reason of the waters of said reservoir finding an underground passage through some hole burrowed out by some animal." From the second defense it appears: That the reservoir was constructed in strict accordance with the plans and specifications of competent and skilled engineers, including the state engineer, and that the plans and specifications of the engineers directed that the dam of the reservoir be abutted at each end of the hillside or mesa, and that the defendant had omitted nothing that human skill and foresight suggested in the construction and maintenance of the reservoir to render it absolutely safe.

A general demurrer to the answer was sustained. The first defense having put in issue the amount of the loss sustained by the plaintiff, thereafter the cause was tried by the court, and judgment rendered for the plaintiff in the sum of $495. From this judgment the defendant appealed to the court of appeals, assigning as error the sustaining of the demurrer and the rendering of judgment.

We assume that the defendant, its officers, and employees, were in no wise culpable, and we shall answer the questions propounded by the defendant, "Is the owner of a reservoir an insurer against any loss occur-

damages. Larimer County Ditch Co. v. Zimmerman, 4 Colo. App. 78, 34 Pac. 1111 (1893).

Statutes imposing liability upon railroad companies for all fires set by the operation of the road are similar to that considered in the principal case and such statutes have been held constitutional and the liability absolute. St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 7, 17 Sup. Ct. 243, 41 L. Ed. 611 (1897); Union Pacific R. Co. v. De Busk, 12 Colo. 294, 20 Pac. 752, 13 Am. St. Rep. 221, 3 L. R. A. 350 (1889); Denver, Texas & Rio Grande R. Co. v. De Graff, 2 Colo. App. 42, 29 Pac. 664 (1892); Martin v. New York & New England R. Co., 62 Conn. 331, 25 Atl.

ring to persons or property by reason of the escape of water from such reservoir, or can such owner excuse himself by showing the absence of negligence?" as being the only ones presented for our consideration.

The statute relied upon as placing an absolute liability upon the owners of a reservoir, has several times been considered by this court and the court of appeals; but the question propounded by defendant has never been answered (by this court).

In Ditch Co. v. Zimmerman, 4 Colo. App. 78, 34 Pac. 1111, the court declined to determine whether the owners of reservoirs were or were not insurers against damage, because such issue was not made by the pleadings, but it did hold that the liability was sufficiently absolute to relieve the plaintiff from alleging and proving negligence. In Sylvester v. Jerome, 19 Colo. 128, 34 Pac. 760, the court held that the statute (§ 2272, Mills' Ann. St. *infra*) was simply an affirmation of a common-law principle.

The common-law principle referred to as being affirmed by the words of the statute is that declared in the case of Rylands v. Fletcher, 3 Law Rep. p. 330 (1868), as follows: "We think that the true rule of law is that the person who, for his own purposes, brings on his own land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his own peril; and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of *vis major,* or the act of God."

But it is said that the American doctrine is not as announced in the case of Rylands v. Fletcher, *supra,* and is that one who artificially collects upon his own premises a substance which from its nature is liable to escape and cause mischief to others, must use reasonable care to restrain it, and is answerable for any damage occasioned to others by a want of such care; and Thompson, in his work on Negligence, announces the foregoing as the American doctrine on the subject. We are of opinion that neither the common law nor the so-called American doctrine should control us in the determination of this case; but that

239 (1892); Matthews v. St. Louis & S. F. R. Co., 121 Mo. 298, 24 S. W. 591, 25 L. R. A. 161 (1894); Campbell v. Missouri Pac. R. Co., 121 Mo. 340, 25 S. W. 936, 42 Am. St. Rep. 530, 25 L. R. A. 175 (1894); Wabash R. Co. v. Ordelheide, 172 Mo. 436, 72 S. W. 684 (1903); Baltimore & Ohio R. Co. v. Kreagen, 61 Ohio St. 312, 56 N. E. 213 (1899); Macdonald v. New York, New Hampshire & H. River R. Co., 23 R. I. 558, 51 Atl. 578 (1902); Gorham Mfg. Co. v. New York, New Hampshire & H. River R. Co., 27 R. I. 35, 60 Atl. 631 (1905); Thompson v. Richmond & D. R. Co., 24 S. C. 366 (1886); Brown v. Carolina Midland R. Co., 67 S. C. 481, 46 S. E. 283, 100 Am. St. Rep. 756 (1903).

the statutes fix the liability of reservoir owners, and we shall base our judgment entirely upon a construction of our own statutes. Section 2272, Mills' Ann. St., is as follows: "The owners of the reservoirs shall be liable for all damages arising from leakage or overflow of the waters therefrom, or by floods caused by breaking of the embankments of such reservoirs." This section is found in the Session Laws of 1879 (Laws 1879, p. 107, § 40). The statute places an absolute liability upon the owners of reservoirs for all damages arising from leakage, or overflow of the water, or by floods caused by the breaking of the embankment. No exception is mentioned and unless an exception appears in the statute we must presume that none was intended, and it would be a gross abuse of the judicial power to construe away the words of the statute by holding the owners of reservoirs exempt from liability for damage, upon their proof of the exercise of reasonable care and caution.

In 1899 the legislature enacted "An act in relation to reservoirs" (Laws 1899, c. 126), and it is claimed by counsel that section 2272, being the section found in the chapter on irrigation, was impliedly repealed by the later statute, and the decisions of this court declaring that a subsequent statute revising the whole subject-matter of the former, and evidently intended as a substitute for it, although it contains no express words to that effect, must operate as a repeal of the former, are cited in support of the contention. This is undoubtedly the rule of construction, and if it were applicable to this case, would control; but the Statute of 1899 cannot be said to have been intended by the legislature as a substitute for the Law of 1879; by the very terms of the act itself, it only applies to reservoirs having certain capacity or dams having certain dimensions. By the act, dams of the dimensions mentioned are required to be under the supervision of the state engineer, and it becomes his duty to supervise the construction of reservoirs, and exercise a general supervision of them at all times, to the end that they may not overflow and that breakage or seepage may not occur.

Whenever in his judgment, any of the structures become unsafe, it becomes his duty and the duty of the owners under his direction to draw off sufficient water or to otherwise prevent, if possible, overflow or breakage. Knowing the imminent danger attendant upon the storage of water, and to avoid as far as it was possible for human agency to avoid

Likewise a liability, imposed by statute upon railroads, for the flooding of lands by reason of insufficient culverts in its embankments, etc., has been held to be absolute. Gulf, Colorado & S. F. R. Co. v. Donahoo, 59 Tex. 128 (1883); Gulf, Colorado & S. F. R. Co. v. Hensley, 62 Tex. 593 (1884); Austin & Northwestern R. Co. v. Anderson, 79 Tex. 427, 15 S. W. 484 (1891); Ft. Worth & D. C. R. Co. v. Suter (Tex. Civ. App.), 118 S. W. 215 (1909).

damages to the lower proprietors, the legislature provided the scheme of protection found in the Law of 1899, and if the owners of reservoirs are to be absolved from liability for damages upon proof of the exercise of ordinary care in the construction, maintenance, and operation of their property, then a compliance with the terms of the statute should, ordinarily, relieve them from all responsibility; but the legislature, with a prophetic vision, saw in the progress of the development of the state, the holding back of the waters of every stream in the mountains for the purpose of storage, to water the lowlands and to supply the power for manufacturing and other purposes, and that on the elevated portion of the plains there would be constructed reservoirs in great numbers for the storage of water out of season for irrigation purposes, and knowing that unless these reservoirs were constructed and maintained upon scientific principles, they would become a constant menace to the lives and property of citizens, and that each recurring season would witness appalling disasters beyond the possibility of pecuniary compensation, the legislature appears to have been willing to permit the impounding of water, and to provide the means by which structures built for that purpose should be rendered as harmless as skill and science could make them; but it does not show an intention to relieve the owners from liability upon compliance with the statutory provisions, and to leave the persons and property of our citizens without remedy in the event of injury, for in the very law which requires supervision by the state engineer, we find the following: "None of the provisions of this act shall be construed as relieving the owners of any such reservoir from the payment of such damages as may be caused by the breakage of the embankments thereof, but in the event of any such reservoir overflowing, or the embankment, dams, or outlets breaking or washing out, the owners thereof shall be liable for all damages occasioned thereby," evincing in positive and direct terms a legislative purpose to hold owners liable for all damages occasioned by the breaking of a reservoir.

Thus, whether the owners of reservoirs have or have not complied with the Law of 1899, and whether they were or were not guilty of negligence in the construction or maintenance or operation of their property, and whether the section of the Law of 1879 was or was not repealed by the later Law of 1899, the liability is the same. It is said that the case of the Denver City Irrigation & Water Co. v. Middaugh, 12 Colo. 434, 21 Pac. 565, 13 Am. St. Rep. 234, supports the contention of the appellants that they are excused from the payment of damages upon proof of the exercise of ordinary care. A careful reading of Justice Hayt's opinion in that case discloses that the question before the court was not whether the owners of the reservoir were or were not

insurers against damages, but whether one whose land had been taken under the eminent domain act for reservoir purposes, and having been awarded a sum of money for damages to the land not taken, can or cannot recover damages upon allegation of negligence or of unskillful construction of the reservoir. The court held that "in assessing damages for the lands taken for the construction of a canal or reservoir thereon, injuries to the residue of such lands arising from seepage and leakage from such canal and reservoir should be anticipated, and damages for the same should be included in the original assessment; and no subsequent recovery for such injuries will be allowed, unless such negligence or unskillfulness be shown."

Our attention is also directed to several decisions of this court holding proprietors to the exercise of ordinary care only in the construction and operation of ditches, and counsel contends that as the liability of ditch owners and reservoir owners is declared in similar language, although in different sections, no higher degree of care should be required of reservoir owners than is required of ditch owners. It is true that the ditch owners have been held to the exercise of ordinary care only, for the statute does not hold them to an absolute liability. There is very good reason for the legislative distinction. A ditch carrying water can, by the exercise of ordinary care, be rendered harmless. The carrying of water through ditches is not a dangerous or menacing vocation—the water is not restrained and the pressure is but slight—while in a reservoir, the water is restrained and the pressure is very great, so great that the exercise of the greatest amount of care and skill may not prevent the water from effecting its escape.

The statute imposing liability upon railroads for all damages by fire set out or caused by operating the road, is very similar to the statute we have under consideration, and this court has held that such a law is not in violation of the Constitution, and that the liability of the railroad company is absolute. The case, Union Pacific R. Co. v. De Busk, 12 Colo. 294, 20 Pac. 752, 3 L. R. A. 350, 13 Am. St. Rep. 221, is a very instructive one, and the writer of the opinion reviews many authorities decisive of the question.

As the underlying principle of the decisions upholding the legislative act imposing absolute liability upon railroads for damages by fire apply with equal force to the statute we have under consideration here, we shall quote at length from some of those decisions. It will be found that it is intimated, at least, that in granting permission to make use of so dangerous an agency as fire, when the utmost care and vigilance cannot prevent injury to innocent persons, if the users of such agency are

held to the exercise of ordinary care only, such legislation would not only be unjust, but of doubtful validity.

In the case of Campbell v. M. Pac. R. Co., 121 Mo. 340, 25 S. W. 936, 25 L. R. A. 175, 42 Am. St. Rep. 530, the court, in construing a statute of the State of Missouri, imposing a liability upon railroad companies for damages resulting from fire set out or caused by the operation of its road, had this to say: "It is unquestioned that the utmost diligence and care cannot prevent the escape of fire from locomotive engines. We have, then, this condition of things. The corporation is given the right, by the statute, to run its engines by steam power, necessitating the use of fire. Fire necessarily escapes, and is scattered along the route. The citizen owns property on the line of the road, which is exposed to fire from those engines, regardless of the care and vigilance he may exercise. Both parties are faultless, but nevertheless the property of the owner is consumed by fire from an engine. The property owner has the right to own the property, and to claim protection under the law, equal at least, to the right of the corporation to use fire on its engines. The loss must necessarily fall upon one or the other of these parties. Which one of them shall suffer the loss,—the one through whose agency the damage was caused, though in the lawful use of its own property, or the one equally innocent of wrong, and who had no agency in causing the damage? Tested by the rule of natural right and equity, there could be but one answer to the inquiry. This answer is formulated into the maxim that 'Every one should so use his own property as not to injure that of his neighbor.'"

Construing the same statute, the Supreme Court of Missouri, in the case of Mathews v. St. L. & S. F. R. Co., 121 Mo. 298, 24 S. W. 91, 25 L. R. A. 161, said: "If the state is powerless to protect its citizens from the ravages of fires set out by agencies created by itself, then it fails to meet one of the essentials of a good government. Certainly it fails in the protection of property. The argument of the defendant reduced to its last analysis is this: The state authorized the railroad companies to propel cars by steam. To generate steam, they are compelled to use fire, therefore they can lawfully use fire, and as they are pursuing a lawful business, they are only liable for negligence in its operation; and when, in a given case, they can demonstrate they are guilty of no negligence, then they cannot be made liable. To this the citizen answers: 'I also own my land lawfully. I have the right to grow my crops, and erect buildings on it at any place I choose. I did not set in motion any dangerous machinery. You say you are guiltless of negligence. It results then that the state which owes me protection to my property from others, has chartered an agency, which, be it ever so careful and cautious and

prudent, inevitably destroys my property, and yet denies me all redress. The state has no right to take or damage my property without just compensation.' But what the state cannot do directly, it attempts to do indirectly, through the charters granted to railroads, if defendant's contention be true. When it was demonstrated that although the railroads exercised every precaution in the construction of their engines, the choice of their operatives, and clearing their rights of way of all combustibles, still fire was emitted from their engines, and the citizen's property burned notwithstanding his efforts to extinguish it, and notwithstanding he had in no way contributed to setting it out, it is perfectly competent for the state to require the company who set out the fire to pay his damages. He is as much entitled to the protection from fire set out by the engines, as he is against the killing of his stock by those engines."

This latter case was taken by writ of error to the Supreme Court of the United States (St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 17 Sup. Ct. 243, 41 L. Ed. 611), where it was affirmed. Mr. Justice Gray, in delivering the opinion of the court, has this to say: "The motives which have induced, and the reasons which justify, the legislation now in question, may be summed up thus: Fire while necessary for many uses of civilized man, is a dangerous, volatile, and destructive element, which often escapes in the form of sparks, capable of being wafted afar through the air, and of destroying any combustible property on which they fall; and which, when it has once gained headway, can hardly be arrested or controlled. Railroad corporations, in order the better to carry out the public object of their creation, the sure and prompt transportation of passengers and goods, have been authorized by statute to use locomotive engines propelled by steam generated by fires lighted upon those engines. It is within the authority of the legislature to make adequate provision for protecting the property of others against loss or injury by sparks from such engines. The right of the citizen not to have his property burned without compensation is no less to be regarded than the right of the corporation to set it on fire. To require the utmost care and diligence of the railroad corporations in taking precautions against the escape of fire from their engines might not afford sufficient protection to the owners of property in the neighborhood of the railroads. When both parties are equally faultless, the legislature may properly consider it to be just that the duty of insuring private property against loss or injury caused by the use of dangerous instruments, should rest upon the railroad company, which employs the instruments and creates the peril for its own profit, rather than upon the owner of the property, who has no control over or interest in those instruments."

Finally it is urged that the statute imposes no liability, except for the breaking of the bank or dam of the reservoir. It is stated in the answer that neither the bank nor the dam broke, but that the injury was occasioned by the washing out of the mesa or hillside. The contention is that the words "embankment" and "dam" cannot be construed to cover or include natural barriers. We cannot agree with this contention. In our opinion, whenever the builder of a reservoir uses a natural bank or dam for impounding water, he adopts it as part of his reservoir, and must be held to the same liability as if it were built by him. The legislature did not intend that one who appropriates a natural bank as part of his reservoir should be exempt from liability in the event of its washing out, but did intend the word "embankment" should include not only an artificial barrier, but a natural one as well, if used as a part of the reservoir, to prevent the escape of water. This construction is supported by the case of Barber v. Nottingham Canal Co., 15 C. B. N. S., at page 747.

The storage of water is a source of profitable investment of capital. The owners know, however, that water, from its nature, is pressing outward in all directions and continually striving to break through any artificial barrier by which it may be restrained. They know that the breaking of the barrier may result in great damage to many innocent persons; that death and destruction may follow the escape of the stored water, and the legislature has said to these owners: "If you collect so dangerous an agency on your own land, you must keep it confined; if it escapes, it is at your peril."

For the reasons given, the judgment is affirmed.

Judgment affirmed.

CAMPBELL, J., dissents; HILL, J., not participating.

On Petition for Rehearing.

PER CURIAM. We have held that the statute imposes an absolute liability, but we have not held that a reservoir owner may or may not, under the law of the land and notwithstanding the statute, be excused from liability upon showing that the injury was caused by the act of God or the public enemy.

Petition for rehearing denied.

CAMPBELL and HILL, JJ., not participating.

FLYNN GROUP MIN. CO. v. MURPHY.

[Supreme Court of Idaho, May 23, 1910; on petition for rehearing, June 22, 1910.]

18 Idaho 266, 109 Pac. 851, 138 Am. St. Rep. 201.

(Syllabus by the Court.)

1. **Appeal—Review of Findings—Conflict in Evidence.**

When there is a substantial conflict in the evidence upon which any finding of fact is based, such finding will not be reversed on appeal.

2. **New Trial Properly Denied.**

Held, that the court did not err in denying a new trial on the ground of newly discovered evidence.

3. **Mining Claims—Location—Unoccupied Territory.**

A subsequent valid location of a mining claim in this state cannot be made on mineral land that is already covered by a valid location.

4. **Same—Rights of Subsequent Locators.**

Where a discovery is made on a vein of mineral bearing rock, and the notice provides that such claim extends several hundred feet in a northwesterly direction and eight hundred feet in a southeasterly direction from such discovery, and the corner stakes on the southeasterly end are so placed as to take in more than eight hundred feet of such vein, subsequent locators may legally locate the excess of ground, as the first location is valid only to the extent of eight hundred feet southeasterly from the point of discovery on said claim.

CASE NOTE.

Location Must Be Marked on the Ground.

5. Same—Defining Boundaries.

The law requires the locator to make his location so definite and certain that from the location, notice and stakes and monuments on the ground the limits and boundaries of the claim may be ascertained, and so definite and certain as to prevent the changing or floating of such claim.

6. Same—Excessive Location—Fraud.

Where the boundaries of a claim are made excessive in size, with fraudulent intent, it is void; or, if so large as to preclude the presumption of innocent error, fraud will be presumed.

7. Same—Location—Discovery Monument.

Under the provisions of section 3207, Rev. Codes, the locator of a mining claim is required to erect a monument at the place of discovery upon which, among other things, he must place the distance claimed along the vein each way from such monument.

8. Same—Location of Excess Ground Within Stakes.

Held that where a location notice states that the mining claim which it describes extends seven hundred feet in a northwesterly direction and eight hundred feet in a southeasterly direction along the lode, a locator may go to the point of discovery of such claim and measure the ground from the discovery point eight hundred feet in a southeasterly direction along the lode, and if there be any unlocated ground beyond that eight hundred feet, may legally locate it, regardless of the fact that the easterly end stakes had been established beyond the eight hundred feet.

I. Law Mandatory—Marking Essential.

The provisions of the law requiring the marking on the ground are mandatory. Worthen v. Sidway, 72 Ark. 215, 79 S. W. 777 (1904); Ware v. White, 81 Ark. 220, 108 S. W. 831 (1906); Funk v. Sterrett, 59 Cal. 613 (1881).

The distinct marking of the location upon the ground, so that its boundaries can be readily traced, is the main act of original location, and the ultimate fact in determining the validity of the location. Donahue v. Meister, 88 Cal. 131, 25 Pac. 1099, 22 Am. St. Rep. 283 (1891); Eaton v. Norris, 131 Cal. 563, 63 Pac. 856 (1901); McCleary v. Broddus (Cal. App.), 111 Pac. 125 (1910).

The marking of the location so that the surface boundaries may be readily traced is essential to a valid location. Daggett v. Yreka Min. Co., 149 Cal. 357, 86 Pac. 968 (1906); Strepey v. Stark, 7 Colo. 614, 5 Pac. 111, 17 Mor. Min. R. 28 (1884).

One of the imperative requirements of the statute, an indispensable condition precedent of a valid location, is that it shall be "distinctly marked on the ground so that its boundaries can be readily traced." Gleeson v. Martin White Min. Co., 13 Nev. 442, 9 Mor. Min. R. 429 (1878).

One who fails to erect monuments and corner posts and to properly mark the boundaries of his claim assumes the risk of third parties' rights intervening. Protective Min. Co. v. Forest City Min. Co., 51 Wash. 643, 99 Pac. 1033 (1909).

II. Where Failure Excused.

The mining laws do not, any more than any other law, require parties to perform impossibilities, and therefore, the failure to stake a part of one line, because the ground was the side of a precipice and inaccessible, does not avoid the location. Eilers v. Boatman, 3 Utah 159, 2 Pac. 66, 15 Mor. Min. R. 462 (1883), affirmed 111 U. S. 356, 4 Sup. Ct. 432, 28 L. Ed. 454 (1884).

III. Purpose and Object of Law.

The law is certainly complied with whenever stakes and monuments are so placed upon the ground that the boundaries of the location can be traced with reasonable certainty, and without any

9. Same—Fraud.

The case of Nicholls v. Lewis & Clark Mining Co., 18 Idaho 224, 109 Pac. 846, cited and approved, and the case of Atkins v. Hendree, 1 Idaho 95, cited and disapproved, so far as it holds that no fraud can be perpetrated where there exists the means of ascertaining or discovering the fraud.

10. Same—Essentials of Location Notice.

Under the provisions of section 3207, Rev. Codes, the location notice is not required to describe the exterior boundaries of the claim.

11. Same—Sufficiency of Location Notice.

Where it appears that a mining claim has been located in good faith, if by any reasonable construction the language used in the location notice describing the claim and referring to natural objects and permanent monuments imparts knowledge of the location of such claim to a subsequent locator, it is sufficient.

12. Same—Relocation—Evidence.

Held, that the locator had actual notice that the ground in controversy had been located, as well as constructive notice by an examination of the recorded notice, and that no technicalities will be resorted to to sustain his relocation of the same ground.

13. Same—Performance of Assessment Work—Evidence—Possession.

Held, that the finding of the court to the effect that the respondent had performed the assessment work on the Murphy fraction for nine years, and that

practical difficulty. The object of the law in requiring the location to be marked on the ground is to fix the claim to prevent floating or swinging so that those who in good faith are looking for unoccupied ground in the vicinity of previous locations may be enabled to ascertain exactly what has been appropriated in order to make their locations upon the residue, but the law does not in express terms require the boundaries to be marked. It requires the location to be so marked that its boundaries can be readily traced. Stakes at the corners do not mark the boundaries. They are only a means by which the boundaries may be traced, but they are sufficient for that purpose. Book v. Justice Min. Co., 58 Fed. 106 (1893); Walsh v. Erwin, 115 Fed. 531 (1902); Gleeson v. Martin White Min. Co., 13 Nev. 442, 9 Mor. Min. R. 429 (1878).

Marking the boundaries of the surface of the claim as required by statute is one of the first steps towards a location. It serves a double purpose. It operates to determine the right of the claimant as between himself and the general government, and to notify third persons of his rights. Another seeking the benefits of the law, and going upon the ground, is distinctly notified of the appropriation and can ascertain its boundaries. He may thus make his own location with certainty, knowing that the boundaries of the other cannot be changed so as to encroach on grounds duly appropriated prior to the change. The prevention of fraud by swinging or floating is one of the purposes served. Gird v. California Oil Co., 60 Fed. 531, 18 Mor. Min. R. 45 (1894).

Marking the boundaries of the surface claim as required by statute is one of the first steps toward a location. It serves a double purpose. It operates to determine the right of the claimant as between himself and the general government and to notify third persons of his rights. Pollard v. Shively, 5 Colo. 309 (1880).

The intention of the law is to give one seeking the locus of a recorded claim something in the nature of an initial point from which to start and, following the course or distance given, find with reasonable certainty the claim located. The identification must be by reference to some natural object or permanent monument. Stone monuments,

he had worked and was in possession of said fraction for more than five years, and that during said period of time there was no adverse claim made to said premises or to any part thereof, is fully sustained by the evidence.

Action in support of adverse claim under United States Rev. Stat., § 2326. Appeal from judgment for defendant and order denying motion for new trial. Affirmed.

For appellant—Franklin Pfirman.

For appellee—Gray & Knight.

SULLIVAN, C. J. This is an action in support of an adverse claim under the provisions of Rev. St. U. S., § 2326 (U. S. Comp. St. 1901, p. 1430). It appears that in June, 1908, the respondent, Murphy, claiming to be the owner of the Murphy fraction lode, situated in Lelande mining district, Shoshone County, made application for a patent therefor in the United States Land Office at Coeur d'Alene, to which application the appellant, the Flynn Group Mining Company, which will hereafter be

blazed trees, the point of intersection of well known gulches, ravines or roads, prominent buttes, hills, mining shafts, etc., are enumerated as satisfying the rules of the law. Drummond v. Long, 9 Colo. 538, 13 Pac. 543, 15 Mor. Min. R. 510 (1886).

The whole object of the statute which requires a reference to a natural object or permanent monument, is to direct the attention of the after-comer to the locality of the claim, and if he goes on the ground and finds the claim properly staked he may then go to the record and find out whether the statute has otherwise been complied with and if therein there is a statutory description, the record is adequate and sufficient. Duncan v. Fulton, 15 Colo. App. 140, 61 Pac. 244, 20 Mor. Min. R. 522 (1900).

IV. Time of Marking.

A. Within Reasonable Time.

The discoverer is entitled to a reasonable time after discovery within which to complete his location. What would be a reasonable time would depend upon circumstances affecting the ability of the locator to properly define his claim, and these circumstances should be such as pertain to the ground to be located, its character, the means of properly marking the ground sought to be located and the ability to properly ascertain the dimensions and course or strike of the vein on account of which the location is to be made. In affording this reasonable time to complete a location, the object is to eliminate, so far as circumstances will permit, guesswork in the location of the claim. Doe v. Waterloo Min. Co., 70 Fed. 455, 17 C. C. A. 190, 18 Mor. Min. R. 265 (1895).

The signing of a notice and posting it on a tree at the northeast corner of the claim, and also the building thereof a monument of stone and pieces of decayed wood and the next day putting up the center and another corner monument and twelve days later monuments at the other corners, so that the lines of the boundaries could be readily traced, is a sufficient compliance with the law. Donahue v. Meister, 88 Cal. 31, 25 Pac. 1099, 22 Am. St. Rep. 283 (1891).

B. Before Other Rights Intervene.

Where the original marking was defective, but the claim was properly marked before a subsequent location was

referred to as the mining company or the appellant, filed its adverse claim to said application, and thereafter on October 6, 1908, commenced this action in support of said adverse claim. The mining Company's adverse claim was based on its alleged ownership of the Erin fraction lode claim, which it is alleged covered almost the identical ground included in the Murphy fraction claim. The contention of the mining company is that the Murphy fraction claim was not a valid location, for the reason that the ground included within its boundaries was at the time of its location included in other mining locations, to-wit, the Snowdrift, the Buffalo, and Parret fractions. The issues as made by the pleadings were tried by the court without a jury, the findings of fact and judgment were made and entered in favor of the respondent. Thereafter a motion for a new trial was denied, and this appeal is from the judgment and order denying the new trial. The following, among other facts, appear from the record:

made, the subsequent locator cannot object upon the ground that the original marking was defective. Jupiter Min. Co. v. Bowdie Consol. Min. Co., 11 Fed. 666, 7 Sawy. 96, 4 Mor. Min. R. 411 (1881).

A subsequent locator cannot object to the first location as marked on the ground within the time prescribed by a statute, provided it was sufficiently marked before his location. Crown Point Gold Min. Co. v. Crismon, 39 Or. 364, 65 Pac. 87, 21 Mor. Min. R. 406 (1901).

Where boundaries are properly marked before a subsequent location is attempted to be made, it is immaterial that they were not properly marked in the first instance. McPherson v. Julius, 17 S. D. 98, 95 N. W. 428 (1903).

The marking of boundaries is not required to be done upon the day of the posting of the location notice. It is sufficient if it be done within a reasonable time, prior to the intervention of adverse rights by others. Brockbank v. Albion Min. Co., 29 Utah 367, 81 Pac. 863 (1905).

The United States Revised Statute prescribes no exact time within which the marking on the ground shall be done, and therefore, a reasonable time therefor is impliedly given. As to what is a reasonable time is a question of law, and depends upon the circumstances of each particular case. Held that eight days was not an unreasonable time. Union Min. & Mill. Co. v. Leitch, 24 Wash. 585, 64 Pac. 829, 85 Am. St. Rep. 961 (1901).

V. Character of Marks Not Prescribed by Federal Law.

Notice describing the location as a placer mining claim 1,500 feet running with the creek and 300 feet on each side from the center of the creek known as McKinley Creek in Porcupine Mining District, written upon a stump or snag in the creek, was held a sufficient location, as the creek was identified, and between it and the stump there was a definite relation which combined with the measurements, enabled the boundaries of the claim to be readily traced. McKinley Creek Min. Co. v. Alaska-United Min. Co., 183 U. S. 563, 22 Sup. Ct. 84, 46 L. Ed. 331 (1902).

Congress has not prescribed how the location shall be made. It has simply provided that it "must be distinctly marked on the ground so that its boundaries can be readily traced," leaving the details, the manner of marking, to be settled by the regulations of each

On April 8, 1887, Francis Murphy, the respondent (whose name appears in the record sometimes as Francis and sometimes as Frank Murphy) and Andrew Short located the Snowdrift lode mining claim, and in the location notice described said claim as "Commencing from discovery, running N. W.700 feet, running S. E. 800 feet from discovery, bounded on N. W. by Black Bear and Cape Horn lodes." In July of 1899, one William P. Flynn, who owned two claims known as the "Buffalo Fraction" and "Parret Fraction," situated in an easterly direction from the Snowdrift, had the same surveyed for a United States patent. It appears that the westerly end lines of those two claims were drawn in by the surveyor in an easterly direction, leaving some vacant ground between the Snowdrift on the easterly end and the Buffalo and Parret fractions on the westerly ends; that Flynn had a number of mining claims on Flynn mountain where said named claims were located, and informed a man by the name of Faulkner of the vacant ground, and advised him that inasmuch as he had no mining ground he had better locate it; that Flynn had lived upon that mountain for a great many

mining district. Whether such location shall be made by stone posts at the four corners or simply by wooden stakes, or how many of such posts or stakes shall be placed along the sides or ends of the location, or what other matter of detail must be pursued in order to perfect a location is left to the varying judgments of the mining districts. Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co., 171 U. S. 55, 18 Sup. Ct. 895, 43 L. Ed. 72, 19 Mor. Min. R. 370 (1898).

To make a valid location it is required that "the location must be distinctly marked on the ground so that its boundaries can be readily traced," but the law does not prescribe or define what kind of marks shall be made or upon what part of the ground or claim they shall be placed. Any marking on the ground claimed by stakes and mounds, and written notices whereby the boundaries of the claim located can be readily traced, is sufficient. North Noonday Min. Co. v. Orient Min. Co., 1 Fed. 522, 6 Sawy. 299, 9 Mor. Min. R. 529 (1880).

The law does not prescribe by what kind of marks the boundaries shall be marked or upon what part of the claim they shall be placed. Any marking by stakes, mounds and written notices is sufficient, if the boundaries can be readily traced therefrom. Jupiter Min. Co. v. Bowdie Consol. Min. Co., 11 Fed. 666, 7 Sawy. 96, 4 Mor. Min. R. 411 (1881).

The location must be distinctly marked upon the ground so that its boundaries can be readily traced. This is all the statute requires. The law does not state how the markings shall be made, the kind of markings, or in what particular place or places on the claim they shall be made. Stakes or posts or piles of stone and boulders are markings. Blazed trees along the boundaries of the claim or at the corners thereof are markings. Cutting away undergrowth or making a trail through the timber along the sides or ends of the claim, putting up a stake at the point of discovery, blazing stumps or posting a notice on the ground, placing such notice in a tin can and attaching it to a stake, fastening such notice to a tree or placing it in a box or frame, are all markings within the laws of the United

years and knew the claims, their discoveries and corners; that he and Faulkner went to the discovery on the Snowdrift claim and measured off in a southeasterly direction eight hundred feet for the purpose of ascertaining how far in a southeasterly direction the Snowdrift ground extended. They thereupon made a discovery on said vacant ground and located the same by staking the ground and extending the stakes outside of the limits of the vacant ground in order that they might be sure and take in all of the ground there vacant. Said claim was located in the name of Frank Murphy as the Murphy fraction, and the location notice was filed for record on August 26, 1899. It appears that during each subsequent year Murphy has performed the assessment work, and has constructed two tunnels upon that ground; that in June, 1906, Joseph F. Whelan, who was the secretary and general manager in full charge of said company's affairs, knew of the Murphy fraction claim and the ground included within its boundaries, and knew that it was claimed by the respondent, and knew that Murphy had constructed two tunnels on said fraction; but on an examination by Whelan of the recorded location

States. Meydenbauer v. Stevens, 78 Fed. 787, 18 Mor. Min. R. 578 (1897).

Section 2324, United States Rev. Stats., does not require the boundary lines to be indicated by physical marks or monuments, nor define what kind of marks shall be made nor upon what part of the ground claimed, but any marking, whether by stakes, mounds, monuments or written notices, whereby the boundaries can be readily traced, is sufficient. Oregon King Min. Co. v. Brown, 119 Fed. 48, 22 Mor. Min. R. 414 (1902).

VI. Permanent Monument or Natural Object—What Sufficient as.

The discovery cut may be recognized as a monument. McEvoy v. Hyman, 25 Fed. 596, 15 Mor. Min. R. 397 (1885).

Where claims are located by serial numbers above and below discovery the court will infer, in the absence of evidence to the contrary, that the other claims of the series are well known and they are thus sufficient to refer to as permanent monuments. Butler v. Good Enough Min. Co., 1 Alaska 246 (1901).

Reference to a located mining claim is sufficient reference to a natural object or permanent monument in fixing the boundaries of a location of another claim. Shattuck v. Costello, 8 Ariz. 22, 68 Pac. 529 (1902).

Statement in a location notice that claim is "bounded on the east by the Handy Mine and is one quarter mile south of Borax Road and about three miles east of the town of Calico," held sufficient reference to natural objects. McCann v. McMillan, 129 Cal. 350, 62 Pac. 31, 21 Mor. Min. R. 6 (1900).

The prominent monuments of a neighboring mining claim have been regarded as sufficient as a prominent monument. Drummond v. Long, 9 Colo. 538, 13 Pac. 543, 15 Mor. Min. R. 510 (1886).

It has been many times held that mountains, hills, canyons, gulches, ravines, and like natural elements in the landscape, are natural objects and permanent monuments to which reference may be made. Duncan v. Fulton, 15 Colo. App. 140, 61 Pac. 244, 20 Mor. Min. R. 522 (1900).

A description tied to a patented mining claim is sufficient. Duncan v. Fulton, 15 Colo. App. 140, 61 Pac. 244, 20 Mor. Min. R. 522 (1900).

notice of the Murphy fraction, he concluded that said notice was not sufficient and proceeded to locate said ground by the Erin fraction claim on behalf of said mining company. Murphy having ascertained that the original location notice of the Murphy fraction was defective, made an amended location of said claim on November 13, 1906, and thereafter made application for a United States patent for said claim, and the mining company's adverse claim is based upon said Erin fraction location.

The Erin fraction lode was located long after the Murphy fraction lode, and the title of the appellant to the ground in controversy depends upon the invalidity of the Murphy fraction location. Appellant largely rests its case on the fact that the Murphy fraction was an invalid location, for the reason that it was located on premises included within the Snowdrift claim. The Snowdrift claim was located in 1887; the Murphy fraction on August 26, 1899; the Erin fraction on June 6, 1906. Appellant contends that the Snowdrift claim was staked upon the ground, and included within its exterior boundaries the discovery of the Murphy fraction lode, and that said Murphy fraction lode was therefore a void

The boundaries of adjoining claims may be a permanent monument to identify a claim. Russell v. Chunasero, 4 Mont. 309, 1 Pac. 713 (1882).

Trees blazed and squared, rock monuments, or the prospect hole, are permanent monuments, within the meaning of the United States Rev. Stats., sec. 2324. Hanson v. Fletcher 10 Utah 266, 37 Pac. 480 (1894).

VII. What Is a Sufficient Marking.

The marking must be sufficiently plain and distinct to enable the sheriff in case of a recovery to execute a writ of possession, or to enable a surveyor to ascertain the exact limits of the location. Glacier Mountain Silver Min. Co. v. Willis, 127 U. S. 471, 8 Sup. Ct. 1214, 32 L. Ed. 172 (1887).

If the center line of a location of a lode claim lengthwise along the lode be marked by a prominent stake or monument at each end thereof, upon one or both of which is placed a written notice showing that the locator claims the length of said line upon the lode from stake to stake, and a certain specified number of feet in width on each side of said line, such location of the claim is so marked that the boundaries can be readily traced and is a sufficient compliance with the law. North Noonday Min. Co. v. Orient Min. Co., 1 Fed. 522, 6 Sawy. 299, 9 Mor. Min. R. 529 (1880).

The law does not in express terms require the boundaries to be marked. It requires the location to be so marked that its boundaries can be readily traced. Stakes at the corners do not mark the boundaries. They are only a means by which the boundaries may be traced, but they are sufficient for that purpose. Book v. Justice Min. Co., 58 Fed. 106, 17 Mor. Min. R. 617 (1893).

The placing at each corner of a stake about four feet high and the placing of small stakes in the side lines and at the point of discovery, and posting notice upon a tree, is a sufficient marking of the location, although the name of the claim is not put upon the stakes. Smith v. Newell, 86 Fed. 56 (1898) .

Painted posts at the four corners of a mill-site is a sufficient marking. Valcalda v. Silver Peak Mines, 86 Fed. 90, 29 C. C. A. 591 (1898).

A blazed tree at the point where the location notice is posted and on one of the boundary lines and three corner

location. There was a conflict in the evidence upon this point, and the court expressly found that the discovery of the Murphy fraction lode was not made within the exterior boundaries of the Snowdrift claim, but was made at a point easterly from the southeasterly end line of said claim.

There was some controversy over the exact location of the original northeast corner of the Snowdrift claim. There is a direct conflict in the testimony upon that question, and the trial court in its seventh finding of fact, among other things, found as follows: "That the northeast corner stake on the said Snowdrift claim was placed at a point from five to eight feet in a northeasterly direction from the present patent corner on the Snowdrift lode claim which is located at the same place as the northwest patent corner of the Murphy fraction lode claim." The court having thus found upon conflicting evidence the location of that corner stake, this court upon all of the evidence on that point is not inclined to reverse that finding. However, on the motion for a new trial the appellant introduced the field notes, plats and survey of the Buffalo

stakes at stated distances from the notice and from each other, one corner stake having been omitted (whether from the nature of the surface of the ground or not not being shown), but the distance of the lines leading to and from that corner being accurately stated so that a surveyor would be enabled without difficulty to ascertain the exact limits of the location, and so that a prospector could easily ascertain the lines of the ground staked off, is a sufficient marking of a location. Walsh v. Erwin, 115 Fed. 531 (1902).

The boundaries of land claimed for mining purposes must be indicated by such distinct physical marks or monuments as will fairly advertise to all concerned where and what it is, or in other words, its extent. English v. Johnson, 17 Cal. 107 (1860); Roberts v. Wilson, 1 Utah 296 (1876).

The physical marks placed upon the ground must be of such prominence as to enable one who honestly endeavors to do so to discover whether the land has been appropriated for mining purposes. Hess v. Winder, 30 Cal. 349, 12 Mor. Min. R. 217 (1866).

A mining location is not distinctly marked on the ground by the posting of a notice on a tree at each end of the claim. Holland v. Mt. Auburn Gold Quartz Min. Co., 53 Cal. 149 (1878).

The posting of a location notice in the center of the claim calling for definite length and width of ground is not a marking of the boundaries, within the meaning of the statute. Gelcich v. Moriarty, 53 Cal. 217, 9 Mor. Min. R. 498 (1898).

Posting notice upon the ledge claiming a certain number of feet in each direction is not a sufficient marking of the boundaries as required by law. Newbill v. Thurston, 65 Cal. 419, 4 Pac. 409 (1884).

The placing of stakes or monuments at each corner of the claim, from which, with the description in the notice, the claim and its boundaries may be readily found, is a sufficient mark. Du Prat v. James, 65 Cal. 555, 14 Pac. 375 (1884).

Stakes and stone monuments at each corner and in the center of each end line, with notices sufficient for identification, is a sufficient compliance with the statute requiring the boundaries to be distinctly

and Parret fraction lodes and the affidavit of Mr. Pfirman, which it is contended, clearly establishes the fact that the court made an error in said finding and that said plat and field notes show that Mr. Flynn testified falsely on the trial when he testified that said northeast corner of the Snowdrift lode was within five or eight feet of the corresponding corner as patented.

In opposition to said affidavit, the respondent filed the affidavit of Arthur A. Booth, deputy mineral surveyor, who surveyed said Buffalo and Parret fractions for a patent in the month of July, 1899. From that affidavit it appears that said fractions were staked for patent and the patent corners established, and the westerly end lines of the said claims were drawn in in an easterly direction, and that a large portion of the land now included in the Murphy fraction lode was originally within the exterior boundaries of the Buffalo and Parret fraction lodes, and upon establishing the patent corners of said fractions, the land now included within the Murphy fraction lode, or a large portion thereof, was left outside of said fraction lodes as established upon the ground by that survey; that the patent plat of the survey for said fractions and in

marked. Howeth v. Sullenger, 113 Cal. 547, 45 Pac. 841 (1896).

The law requires the marking of the claim upon the ground to be done in such a manner that any person of reasonable intelligence may go upon the ground and readily trace the claim out, and readily find the boundaries and limits of the claim without instructions, advice or information from any one or thing other than the marking upon the ground; and it is not necessary or required that such person shall have a copy of the notice of location or necessarily use it in tracing the boundaries of the claim, but where such notice is posted upon the claim and constitutes a part of the marking of such claim upon the ground, it may be used as a part of the means by which the boundaries of the claim can be traced. Willeford v. Bell, 117 Cal. 17, 49 Pac. 6 (1897).

While the claim must be distinctly marked upon the ground, it is not required that the location notice should so state. McCann v. McMillan, 129 Cal. 350, 62 Pac. 31, 21 Mor. Min. R. 6 (1900).

Where a claim is located from a common base by a serial number, the placing of a center post on each end with a notice of location posted thereon is a sufficient marking of the boundaries, and especially where such marking is customary with the miners of the district. Loeser v. Gardiner, 1 Alaska 641 (1902).

If the center line of a location lengthwise up and down the creek is marked by a stake or monument at each end thereof, upon one or both of which is placed a written notice showing that the locator claims the length of said line upon the claim, from stake to stake, and a certain specified number of feet in width on each side of the line, the location is so marked that the boundaries can be readily traced unless the conditions or topography of the country, or the great amount of brush or timber on the land would prevent a person making an honest and bona fide effort to trace or ascertain the boundaries from doing so. Moore v. Steelsmith, 1 Alaska 121 (1901).

If the conditions are such that a person passing over the land could see noth-

the field notes he reported the Snowdrift lode unsurveyed, as lying west of the Buffalo and Parret fraction lodes, and so marked upon the patent plat; that he did so purely from hearsay, and he did not at that time survey to any of the corners of the Snowdrift lode, and that he did not intend and did not show, either by his plat or field notes, that the northeast corner of the Snowdrift was identical with corner No. 2 of the Buffalo fraction lode; but referring specifically to his field notes, he did report that corner No. 2 of the Buffalo fraction lode was identical with corner No. 2 of the Josephine lode and corner No. 9 of the Exchequer, and that said field notes and survey did not show and did not pretend to show any of the corners of the Snowdrift lode; that he simply marked the name of the Snowdrift lode unsurveyed on said plat, which he was told was situated in a westerly direction.

We have carefully considered the plats and affidavits used on motion for a new trial, and are satisfied that the court came to the right conclusion in regard to the location of the northeast corner of said Snowdrift lode claim, and did not err in denying a new trial on the ground of newly discovered evidence.

ing to indicate that another had made a location, if whatever had been done towards a location at some prior time was so hidden that persons honestly looking for mineral land upon which to locate could not be expected to observe it, it should not be deemed such a location as the statute contemplates. Moore v. Steelsmith, 1 Alaska 121 (1901).

A legal and fair location of a mining claim would not be made by placing notices upon a tree or stake that was situated in an inaccessible place, or where it was so surrounded by brush and trees growing upon the land that it could not be seen, or that a person passing over said ground, and honestly seeking to make a location, could not, because of such situation, be apprised of the former location having been made. Moore v. Steelsmith, 1 Alaska 121 (1901).

The requirements of the statute are not necessarily fulfilled by merely setting stakes at each of the corners and at the center of the end lines, unless the topography of the ground and the surrounding country are such that a person accustomed to tracing lines of mining claims can, after reading a description of the claim in the posted or recorded notice of location or upon the stakes, by a reasonable and bona fide effort to do so, find all the stakes and thereby trace the boundaries. Where the country is broken or the view from one stake or monument to another is obstructed by intervening timber or brush, it may be necessary to blaze trees along the line, or cut away the brush or set more stakes at such distances that they may be seen from one to the other, in a way to indicate the lines so that the boundaries can be readily traced. Van Valkenburg v. Huff, 1 Nev. 142 (1865).

Two stakes at the ends of the claim on a line with the croppings is sufficient, where the width of the claim is fixed by local rules. Gleeson v. Martin White Min. Co., 13 Nev. 442, 9 Mor. Min. R. 429 (1878).

Setting stakes at the four corners of the claim is a sufficient marking. Gleeson v. Martin White Min. Co., 13 Nev. 442, 9 Mor. Min. R. 429 (1878).

The hewing, blazing, and marking of trees which stand at the corners where

It appears from the evidence of the locators of the Murphy fraction lode that when they went to locate it, they went to the discovery shaft or point on the Snowdrift lode and measured off in a southeasterly direction eight hundred feet from that point, that being the length upon the lode in that direction called for by the location notice, and then located the Murphy fraction easterly of and adjoining said Snowdrift location. But it is contended by appellant that the easterly end line of said Snowdrift claim as marked upon the ground extended more than eight hundred feet easterly from said point of discovery and for that reason was included in said claim, and was not open to location at the time of the location of said Murphy fraction lode; that if said Snowdrift location included more ground than the locators were entitled to, the ground included within the stakes had been segregated from the public domain, and was not subject to location until the locators adjusted the exterior lines thereof and excluded therefrom any surplus ground contained therein, and cites in support of that contention, Belk v. Meagher, 104 U. S. 279, 26 L. Ed. 735, and quotes the following from said decision: "Loca-

posts should be located, is a substantial compliance with the law regarding the marking of claims by the planting of posts at the corners. Marshall v. Harney Peak Tin Min., Mill. & Mfg. Co., 1 S. D. 350, 47 N. W. 290 (1890).

Trees cut off about three feet from the ground and blazed and squared may be considered and regarded as stakes. Hanson v. Fletcher, 10 Utah 266, 37 Pac. 480 (1894).

A mining claim marked at the three corners and in the center of each side line by substantial stakes is sufficiently marked to comply with the statute requiring it to be distinctly marked so that its boundaries can be readily traced. Warnick v. De Witt, 11 Utah 324, 40 Pac. 205 (1895).

Marking by stakes three or four inches in diameter and four or four and one-half feet high at each corner but one, where a stump was marked, is a sufficient marking on the ground. Bonanza Consol. Min. Co. v. Golden Head Min. Co., 24 Utah 159, 80 Pac. 736 (1905).

Marking may be by the repairing and restoring of old monuments upon the premises, and the adoption of the same as the monuments of the location. Brockbank v. Albion Min. Co., 29 Utah 367, 81 Pac. 863 (1905).

VIII. Condition of Country and Surroundings Considered.

The location of a mining lode or vein is made by taking up a quantity of land in the form of a parallelogram not exceeding 1,500 feet in length and 600 feet in width, 300 feet on each side of the middle of the vein at the surface. The location of this piece of land must be distinctly marked on the ground, so that its boundaries can be readily traced. The question as to the sufficiency of the stakes and monuments to enable the location to be traced always depends to a great extent upon the conformation and condition of the ground located. A location on a hill covered by a dense forest might require more definite marking than a location on a bald mountain, where the stakes wherever placed could be readily seen. The law is certainly complied with wherever stakes and monuments are so placed on the ground that the boundaries of the location can be traced with reasonable certainty and

tions can only be made where the law allows it to be done. Any attempt to go beyond that will be of no avail. Hence a relocation on lands actually covered at the time by another valid and subsisting location is void; and this not only against the prior locator, but all the world, because the law allows no such thing to be done."

We fully recognize the rule laid down by the Supreme Court of the United States in that decision, but we do not think that rule applies to the facts of this case. The location notice of the Snowdrift claim provides that the lode claim extends from the point of discovery seven hundred feet in a northwesterly direction and eight hundred feet in a southeasterly direction. If the parties who located it in fact placed their stakes at the northeasterly and southeasterly corners of said claims so as to take in more ground than called for in the notice, such excess was not and could not be legally included in that location. It is not left to the pleasure of the locator to adjust his boundaries when and where he likes within an excessive location when it will interfere with a subsequent locator.

without any practical difficulty. Book v. Justice Min. Co., 58 Fed. 106, 17 Mor. Min. R. 617 (1893).

The statute requires that the location must be marked on the ground so that its boundaries can be readily traced, but it does not prescribe or define the nature of the marks or the position of the same on the ground. It is universally held that any marking on the ground whereby the boundaries of the claim may be readily traced is sufficient. In determining the question, the court or jury is not limited to the consideration of stakes or other permanent monuments on the ground, but may consider the topography of the ground, the condition of the country, and the surrounding circumstances in order to find if a sufficient marking has been made. Charlton v. Kelly, 156 Fed. 433, 84 C. C. A. 295 (1907).

Whether the marking by stones and stakes is sufficient may depend upon the condition of the ground to be located. If the conformation is such that the monuments and stakes would so mark the boundaries as that they could be readily traced, they would be sufficient; otherwise, not. Taylor v. Middleton, 67 Cal. 656, 8 Pac. 594, 15 Mor. Min. R. 284 (1885).

IX. Stakes, etc., Placed Off Claim.

The mere fact that some of the stakes are placed upon a location already made will not render the location valid. Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co., 171 U. S. 55, 18 Sup. Ct. 895, 43 L. Ed. 72, 19 Mor. Min. R. 370 (1898).

The fact that one stake is placed upon another claim and that a portion of the latter claim is included within the boundaries of the former, as marked upon the ground, does not invalidate the location. Perigo v. Erwin, 85 Fed. 904, 19 Mor. Min. R. 269 (1898), affirmed 93 Fed. 608, 35 C. C. A. 482 (1899).

Where, by mistake, certain of the monuments are placed upon an adjoining claim, the whole location will not be invalidated, but will be held good as to the part subject to location. Doe v. Tyler, 73 Cal. 21, 14 Pac. 375 (1887).

Where the end stakes are beyond the limits of the claim as given in the location notice, the space between the stakes and the end of the claim as so given is

Counsel for appellant contends that a locator may cover or include within his location an excessive area of ground and hold it against the world until he gets ready to conform it to the area allowed by the mining laws or until he has the same surveyed for a patent. We recognize the rule that where a claim is excessive in area the location is not void unless the excess is so great as to impress the locator with a fraudulent intent. The intent of the law is to require the locator to make his location so definite and certain that from the location notice and the stakes and monuments on the ground the limits and boundaries of the claim may be readily ascertained, and so definite and certain as to prevent the changing or floating of the claim. This court held in Burke v. McDonald, 2 Idaho (Hasb.) 679, 33 Pac. 49, that where the boundary of a claim is made excessive in size with fraudulent intent, it is void; or if so large as to preclude innocent error, fraud will be presumed. Stemwinder Min. Co. v. Emma & L. C. Con. Co., 2 Idaho (Hasb.) 456, 21 Pac. 1040.

open to location by a third party. Flynn Group Min. Co. v. Murphy, principal case.

All the statute requires is that the land should be so marked upon the ground that the boundaries can be readily traced. This does not mean that the marks shall be upon the actual ground included within the mining claim, but they may be upon any ground adjoining near enough to readily designate the boundaries. It was certainly never intended that a slight mistake in the setting of stakes should invalidate a location. All that was intended is that a person seeking to make a subsequent location could go upon the ground referred to and from the marks made find the boundaries of the claim. West Granite Mt. Min. Co. v. Granite Mt. Min. Co., 7 Mont. 356, 17 Pac. 547 (1888).

X. Monuments Control Courses and Distances.

Monuments are to be followed in preference to courses and distances when the latter do not agree with the former. McEvoy v. Hyman, 25 Fed. 596, 15 Mor. Min. R. 397 (1885).

The Statute of Colorado provides that surface boundaries shall be marked by six substantial posts hewed or marked on the side or sides which are in toward the claim and sunk in the ground, to-wit, one at each corner and one at the center of each side line. Such statutory monuments, substantially complying with the requirements of the law, would control courses and distances so that where there was a variation between the courses and distances given in the certificate of location and the monuments on the ground, the latter would prevail. Pollard v. Shively, 5 Colo. 309 (1880).

The rule of law is that monuments will control courses and distances, and while judges in commenting upon the facts of particular cases speak of the monuments as being unquestionable, the rule is not so qualified. Cullacott v. Cash Gold & S. Min. Co., 8 Colo. 179, 6 Pac. 211, 15 Mor. Min. R. 392 (1884).

Monuments erected on the ground control the courses and distances given in location notices. Gibson v. Hjul (Nev.), 108 Pac. 759 (1910).

XI. Exactness of Survey Not Required.

It is neither expected nor required that the locator of a mining claim in marking his claim on the ground so

Among other things, it is provided in section 3207 of the Revised Codes of 1909, as follows: "The locator at the time of making the discovery of such vein or lode, must erect a monument at such place of discovery, upon which he must place his name, the name of the claim, the date of discovery and distance claimed along the vein each way from such monument. Within ten days from the date of discovery, he must mark the boundaries of his claim by establishing at each corner thereof and at any angle in the side lines, a monument, marked with the name of the claim and the corner or angle it represents, also, at the time of so marking his boundaries, he must post at his discovery monument his notice of location in which must be stated: First, the name of the locator; second, the name of the claim; third, the date of discovery; fourth, the direction and distance claimed along the ledge from the discovery; fifth, the distance claimed on each side of the middle of the ledge; sixth, the distance and direction from the discovery monument to such natural object or permanent monument, if any such there be, as will fix and describe in the notice itself the location of the claim; and seventh, the name of the mining district, county and state."

that its boundaries can be readily traced shall be exact in running the lines or in fixing the corner or other posts. It is rarely, if ever, that he has either the time or the facilities for making an accurate survey, and a difference of three or four feet or a few points between the monuments fixed by an actual survey for a patent and those fixed at the time of location is immaterial, and does not affect the validity of the original location. Eilers v. Boatman, 3 Utah 159, 2 Pac. 66, 15 Mor. Min. R. 462 (1883), affirmed 111 U. S. 356, 4 Sup. Ct. 432, 28 L. Ed. 454 (1884).

It is sufficient to give a right to the occupants of mining ground on the government domain, which the courts will protect, to establish by evidence its appropriation by means which are a substantial compliance with the law upon that subject and which in view of the surrounding circumstances will give notice to those who have a right to know that the particular mining ground is subject to the dominion and control of some private claimant. Eilers v. Boatman, 3 Utah 159, 2 Pac. 66, 15 Mor Min. R. 462 (1883), affirmed 111 U. S. 356, 4 Sup. Ct. 432, 28 L. Ed. 454 (1884).

XII. Changing Lines.

The locator is bound by the placing of stakes, and cannot thereafter change the description from that fixed by the stakes, to the prejudice of intervening rights. Whitlesee v. King of Arizona Min. & Mill. Co., 7 Ariz. 95, 60 Pac. 866 (1900).

After the boundaries have been marked on the ground the lines cannot be changed so as to include other ground located by a third party. Golden Fleece G. & S. Min. Co. v. Cable Consol. G. & S. Min. Co., 12 Nev. 312 (1877).

The law requires the locator to make his location so definite and certain that from the location notice and stakes and monuments on the ground the limits and boundaries of the claim may be ascertained, and so definite and certain as to prevent the changing or floating of such claim. Flynn Group Min. Co. v. Murphy, principal case.

XIII. Adopting Old Stakes.

Where old stakes are standing upon the ground, they may be adopted by the

The provisions of said section require a monument of some kind to be erected at the point of discovery, which point is supposed to be on the ledge, and require the locator to place on such monument "the distance claimed along the vein each way from said monument," and also require the location notice to state the direction and distance claimed along the ledge from the discovery. In the location notice of said Snowdrift lode, it is stated that said claim extends in a northwesterly direction along the lode seven hundred feet, and in a southeasterly direction along the lode, eight hundred feet. That notice fixes the distance along the lode that said claim extends from the point of discovery. The ground beyond the eight hundred feet southeasterly from the discovery was not included in said claim, even though the stakes marking the northeasterly and southeasterly corners of said claim were placed beyond the eight hundred feet. Any locator had a right to go to the point of discovery of the Snowdrift claim and measure the ground from the discovery point eight hundred feet in a southeasterly direction along the lode, and if there was any unlocated ground beyond the eight hundred feet, locate

locator if they are in the proper position. Conway v. Hart, 129 Cal. 480, 62 Pac. 44, 21 Mor. Min. R. 20 (1900).

XIV. Sufficiency of Marking Question of Fact.

The question as to whether or not the boundaries of a mining claim are sufficiently marked upon the surface by reference to natural and permanent monuments is one of fact, and the appellate court will be bound by the finding of the trial court thereon. Eilers v. Boatman, 111 U. S. 356, 4 Sup. Ct. 432, 28 L. Ed. 454, 15 Mor. Min. R. 471 (1884).

Whether any marking has been made, and if so whether it is sufficient to indicate the boundaries of the claim, are questions of fact. Meydenbauer v. Stevens, 78 Fed. 787, 18 Mor. Min. R. 578 (1897).

Whether the location has been so marked that its boundaries can be readily traced is a question of fact. Charlton v. Kelly, 156 Fed. 433, 84 C. C. A. 295 (1907).

Whether a mining location is so marked that its boundaries may be readily traced is a question of fact for the jury. Charlton v. Kelly, 2 Alaska 532 (1905-1906).

Whether the boundaries can be readily traced from the stakes or other articles placed upon the ground is a question of fact. Du Prat v. James, 65 Cal. 555, 14 Pac. 375 (1884).

Whether the boundaries of a claim have been sufficiently marked is a question of fact for the jury. Taylor v. Middleton, 67 Cal. 656, 8 Pac. 594, 15 Mor. Min. R. 284 (1885).

The ultimate fact in determining the validity of a location is the placing of such marks on the ground as to identify the claim, or, to use the language of the statute, "of such a character that the boundaries can be readily traced," and it is for the jury, or the court sitting as a jury, to determine whether this has been effected. Eaton v. Norris, 131 Cal. 561, 63 Pac. 856, 21 Mor. Min. R. 205 (1901).

In considering the question whether the boundaries have been fully marked, the jury are not confined to the monuments placed at the corners of the claim at the inception of the location for the purpose of locating it, but may consider also all other objects placed on the

it, regardless of the fact that the easterly end stakes had been established beyond the eight hundred feet.

In Nicholls et al. v. Lewis & Clark Mining Co., 18 Idaho 224, 109 Pac. 846, just decided by this court, the court had occasion to review and disapprove of certain language used by Chief Justice McBride in Atkins v. Hendree, 1 Idaho 95, to wit: "To claim more than the law allows is no fraud on others, for they have the same means of ascertaining the attempted fraud that the other has to commit it," and held that where an excessive mineral location had been made through mistake, while the locator was acting in good faith, the location will be void only as to the excess; but where the locator has purposely included within his exterior boundaries an excessive area with fraudulent intent to hold the entire area under one location, such location is void. Or, if made so large that the location cannot be deemed the result of innocent error or mistake, fraud may be presumed. Chief Justice McBride virtually holds in the case of Atkins v. Hendree, *supra,* that no fraud can be perpetrated where there

ground, either for the purpose of serving as monuments or otherwise, for all that the statute requires is that the claims be marked distinctly on the ground, without regard to the mode. Eaton v. Norris, 131 Cal. 561, 63 Pac. 856, 21 Mor. Min. R. 205 (1901).

Where monuments, for example stakes, stones or a tree, are referred to, parol proof is always admissible to show their location. Cullacott v. Cash Gold & S. Min. Co., 8 Colo. 179, 6 Pac. 211, 15 Mor. Min. R. 392 (1884).

The material substance out of which monuments shall be made is not specified in the law. Their existence and location may become questions of fact to be determined like other questions of fact, according to the rules of evidence. Cullacott v. Cash Gold & S. Min. Co., 8 Colo. 179, 6 Pac. 211, 15 Mor. Min. R. 392 (1884).

What is a natural object or permanent monument sufficient to identify a claim is subject to proof and is a question of fact. Russell v. Chunasero, 4 Mont. 309, 1 Pac. 713 (1882).

The question whether a reference made is to some natural object or permanent monument, is one of fact for the jury. Flavin v. Mattingly, 8 Mont. 242, 19 Pac. 384 (1888); O'Donnell v. Glenn, 8 Mont. 248, 19 Pac. 302 (1888); Gamer v. Glenn, 8 Mont. 371, 20 Pac. 654 (1889).

It is not for the court to say whether or not a certain survey corner is a permanent monument. That is a matter for proof. Metcalf v. Prescott, 10 Mont. 283, 25 Pac. 1037, 16 Mor. Min. R. 137 (1891).

The question as to whether a reference to a natural object or permanent monument is sufficient to identify the boundaries of the claim, is one of fact. Brady v. Husby, 21 Nev. 453, 33 Pac. 801 (1893).

Sufficiency of reference to natural objects or permanent monuments is a question of fact for the jury. Bonanza Consol. Min. Co. v. Golden Head Min. Co., 24 Utah 159, 80 Pac. 736 (1905).

Whether or not a claim is sufficiently marked upon the ground is subject to proof, and is a question of fact for the jury. Farmington Gold Min. Co. v. Rhymney Gold & C. Co., 20 Utah 363, 58 Pac. 832, 77 Am. St. Rep. 913 (1899).

The statute respecting the location of mining claims should be construed with liberality, and the sufficiency of the loca-

exists the same means of ascertaining or discovering the fraud that the other parties had to commit it. We cannot assent to that doctrine, for, as we view it, a fraudulent act still remains fraudulent even though there exists very plain and simple means of ascertaining or discovering the fraud. Where a claim is located in good faith and contains some excess of ground, the location is valid except as to the excess, and others who may desire to make a location may measure the ground and confine the first locator to the limits prescribed by law. This court therefore holds that a subsequent locator may measure the ground of a prior location from the discovery and ascertain the extent of such location, and if it contains more ground within its boundaries than is described in the location notice, and more land than can be located under one location, the subsequent locator may locate the excess and maintain his right thereto. This rule applies to locations not fraudulent on account of containing an unreasonable excess of ground, and it has no application to fraudulent locations such as in the case of Nicholls v.

tion with reference to natural objects or permanent monuments is simply a question of fact. Farmington Gold Min. Co. v. Rhymney Gold & C. Co., 20 Utah 363, 58 Pac. 832, 77 Am. St. Rep. 913 (1899).

XV. Mere Staking of No Effect.

Although a locator finds a location distinctly marked on the ground, it does not necessarily follow therefrom that the location is still valid and subsisting. On the contrary, the ground may be entirely free for him to make a location upon it. Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co., 171 U. S. 55, 18 Sup. Ct. 895, 43 L. Ed. 72, 19 Mor. Min. R. 370 (1898).

The mere fact that the country is rough and mountainous does not relieve the locator from the duty of placing monuments, so that the boundaries may be readily traced. Gird v. California Oil Co., 60 Fed. 531, 18 Mor. Min. R. 45 (1894).

The mere staking of the boundaries of a claim is not a location. It is not true that mining ground cannot be located if some other claimant has put stakes around it. The first claimant may not be a citizen or otherwise capable of holding against a qualified locator, and he may not have complied with other requirements of the law which are just as essential as the marking of the boundaries. Golden Fleece Gold & S. Min. Co. v. Cable Consol. Gold & S. Min. Co., 12 Nev. 312, 1 Mor. Min. R. 120 (1877).

XVI. State Statutes and Local Rules.

Local mining rules requiring the posting of a notice describing the claims, etc., do not dispense with the necessity for distinctly marking the boundaries upon the ground, as required by the general law. Gird v. California Oil Co., 60 Fed. 531, 18 Mor. Min. R. 45 (1894).

The location mining rules and regulations of a district required among other things that in locating a claim, stakes should be put at each of its corners, and also that it should be bounded by a small ditch. Locations within the district must be marked as required by this regulation or they will be held void. Myers v. Spooner, 55 Cal. 257 (1880).

A recorded notice gives no information of a claim not actually located, nor does even a notice posted on the ground, unless it appears that the party posting it

Lewis & Clark Mining Co., for if the location is absolutely void, the ground included therein has not been segregated thereby from the public domain. There is no contention made in the case at bar that the excess in the Snowdrift location, if there was any, was the result of fraudulent intent, but we think it is conceded that such excess, if there was any, was the result of innocent error.

It is contended that the location notice of the Murphy fraction is so defective as to impart no notice whatever. It must be admitted that it does not describe the exterior boundaries of said mining claim. It does, however, contain the seven requisites of a location notice as provided by said section 3207, Rev. Codes. It contains (1) the name of the locator; (2) the name of the claim; (3) the date of the discovery; (4) the distance along the ledge from the discovery; (5) the distance claimed on each side of the ledge; (6) such a description as will fix and describe the location of the claim; (7) the name of the mining district, county, and state. The locator attempted to describe the exterior boundaries

is proceeding to indicate with reasonable diligence or is about to indicate the boundaries, by marking them; and where the local regulations require that the boundaries be marked on the ground and notice of location posted before it is recorded, the priority of different locations will be determined by the priority of marking and posting the notices. Gregory v. Pershbaker, 73 Cal. 109, 14 Pac. 401 (1887).

The phrase "staking off," occurring in local mining regulations, refers to marking the boundaries of claims by stakes or trees, posting of stakes along the vein or its crossings, so as to indicate to other prospectors the ground intended to be appropriated. Becker v. Pugh, 9 Colo. 589, 3 Pac. 906, 15 Mor. Min. R. 304 (1886).

A state cannot dispense with the performance of the conditions imposed by the federal law nor relieve the locator from the obligation of performing the acts declared by it essential to the location, but it may add reasonable additional conditions. Sisson v. Sommers, 24 Nev. 378, 55 Pac. 829, 77 Am. St. Rep. 815, 19 Mor. Min. R. 644 (1899).

Statute of New Mexico provides that "the surface boundaries of all mining claims, wherever located, shall be marked by four substantial posts or four substantial monuments of stone, set at each corner of such claim; such posts or monuments of stone shall be each plainly marked so as to indicate the direction of such claim from each monument of stone or posts." This is a positive requirement and cannot be disregarded any more than any other requirement of the law. Deeney v. Mineral Creek Mill. Co., 11 N. M. 279, 67 Pac. 724, 22 Mor. Min. R. 47 (1872).

Where a state statute requires the marking upon the ground should be made within thirty days after discovery, and the marking is not made until after that time has expired, the discoverer has no rights as against one who has in the interval peaceably entered and located the ground. Copper Grove Min. Co. v. Allman, 23 Utah 410, 64 Pac. 1019, 21 Mor. Min. R. 296 (1901).

XVII. No Presumption of Marking.

There is no presumption that old claims which have been worked for a long period of time, and upon which no monuments marking the boundaries are found, were properly marked upon the

of the claim and utterly failed to do so. The law, however, does not require the notice to describe the exterior boundaries of the claim. It is recited in the notice that the adjoining claims are the Snowdrift on the west and the Buffalo fraction and the Parret fraction on the east, and the evidence shows that those claims were well-known claims at the time of the location of the Murphy fraction.

This court held in Morrison v. Regan, 8 Idaho 291, 67 Pac. 955, that where it appears a mining claim has been located in good faith, if by any reasonable construction the language used in the notice describing the claim and in reference to natural objects and permanent monuments will impart knowledge of the location of the claim to a subsequent locator, it is sufficient. It has frequently been held that reference to well-known mining claims is a sufficient compliance with the law (section 2324, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1426], and section 3207, Rev. Codes 1909), requiring mining locations to be tied to some natural object or permanent monument so as to identify the claim. Hammer v. Milling

ground at the time of their location. Daggett v. Yreka Min. Co., 149 Cal. 357, 86 Pac. 968 (1906).

XVIII. Removal or Obliteration of Marks.

Where location is made in accordance with the statute and the boundaries properly marked, the rights secured thereby cannot be devested by the obliteration of the marks or removal of the stakes without fault of the locator. Jupiter Min. Co. v. Bowdie Consol. Min. Co., 11 Fed. 666, 7 Sawy. 96, 4 Mor. Min. R. 411 (1881).

Where the acts of location have been performed in conformity with the statute, and the right of possession has vested, it cannot be devested by the removal or obliteration of the stakes, monuments, marks or notices without the act or fault of the locator during the time he continues to perform the necessary work upon the claim and to comply with the law in all other essential respects. Book v. Justice Min. Co., 58 Fed. 106, 17 Mor. Min. R. 617 (1893).

Where the ground and the entire territory included within the mining district is extremely rough and mountainous, and the man who erected monuments was dead at the time of the trial, and it was shown that the ground was but a mass of boulders and rocks, broken and otherwise, that the party whom it was alleged erected the monuments was seen engaged in making the location and engaged in the work long enough to have built the monuments the required height, and that after a period of fourteen years, during which heavy storms occurred, some of the monuments were found standing at a height of seven or eight inches, the court is justified in finding that as originally constructed the monuments answered the requirements of a local rule requiring them to be two feet in height. Gird v. California Oil Co., 60 Fed. 531, 18 Mor. Min. R. 45 (1894).

Where a claim has been properly marked, the obliteration of the marks or their removal without the fault of the locator does not affect his rights. Tonopah & Salt Lake Min. Co. v. Tonopah Min. Co. of Nevada, 125 Fed. 408 (1903).

Where locations were made some six years before the trial, and the notices introduced in evidence contained such specific calls and references to monu-

Co., 130 U. S. 291, 9 Sup. Ct. 548, 32 L. Ed. 964; Duncan v. Fulton, 15 Colo. App. 140, 61 Pac. 244; Kinney v. Fleming, 6 Ariz. 263, 56 Pac. 723.

In Hammer v. Milling Co., *supra,* the location notice stated as follows: "This lode located about 1500 feet south of Vaughan's Little Jenny mine." The Supreme Court of Montana held that that was a sufficient reference to a natural object or permanent monument, and the Supreme Court of the United States, sustaining that decision, said: "We agree with the court below that the Little Jenny mine will be presumed to be a well-known object or permanent monument until the contrary appears."

In Bismark Mining Co. v. North Sunbeam Co., 14 Idaho 516, 95 Pac. 14, this court stated as follows: "It is the well-settled doctrine of all of the later decisions that location notices and records should receive a liberal construction, to the end of upholding a location made in good faith;" and quotes from the case of Londonderry M. Co. v. United

ments that a surveyor would have no difficulty in locating the boundaries with knowledge of the location of these monuments testified to by witnesses, although with the location notices in their hands the witnesses would be unable to find all of the particular monuments referred to in the notices, and while true that only such monuments as were then found by the witnesses would not be sufficient to make a proper marking of the boundaries, a finding that the claim was properly marked when, by aid of the location notices and the monuments found, the remaining boundaries could be ascertained, will be sustained. Yreka Min. & Mill. Co. v. Knight, 133 Cal. 544, 65 Pac. 1091, 21 Mor. Min. R. 478 (1901).

The fact that monuments are not found nine years after the time they were placed is not sufficient to offset the testimony of the engineer who set them. Temescal Oil Min. & Dev. Co. v. Salcido, 137 Cal. 211, 69 Pac. 1010, 22 Mor. Min. R. 360 (1902).

XIX. Placer Claims—Reference to Governmental Surveys.

A placer claim is sufficiently marked by placing a stake in the corner of a prior claim and substantial stakes at each of the other corners and in the center of each end line. McIntosh v. Price, 121 Fed. 716, 58 C. C. A. 136 (1903).

Section 2331, United States Rev. Stats., providing that where lands have been previously surveyed by the United States, all placer claims located thereon must conform to the legal subdivisions, does not dispense with the necessity for a marking of the boundaries of the claim upon the ground, and the mere posting of a notice, claiming a certain subdivision as a placer claim, without any marking upon the surface, confers no rights to the land. Worthem v. Sideway, 72 Ark. 215, 79 S. W. 777 (1904).

Where the boundaries of the claim are correctly given in the location notice, but the land was stated to be in the wrong governmental subdivision, it was held sufficient, as the boundaries could be readily ascertained. The reference to the survey was rejected, sufficient remaining to identify the land in accordance with the maxim *Falsa descriptio non nocet cum de corpore constat.* Duryea v. Boucher, 67 Cal. 141, 7 Pac. 421 (1885).

In the location of a placer claim, the mere reference to the legal subdivision is

G. M. Co., 38 Colo. 480, 88 Pac. 455, as follows: "Every case where this question is raised must therefore depend upon its own circumstances. As previously stated, the purpose of such location certificate is to give notice to subsequent locators; and, if by reasonable construction the language descriptive of the situs of a claim, aided or unaided by testimony, aliunde, will do so, it is sufficient in this respect. In other words, the object of requiring a reference to a natural object or permanent monument is to furnish means by which to identify the claim, and whatever reference will accomplish this object satisfies the law."

It appears from the evidence that said Murphy fraction was staked and with the exception of one stake they remained standing up to the time the survey was made for patent. It seems that one of the stakes had fallen down and was not up during the year prior to its survey for a patent. After reciting certain facts in Bismark Mining Co. v. North Sunbeam Co., *supra*, this court said: "Those facts appearing every reasonable presumption that can be drawn therefrom should be in favor of

not sufficient, but the lines must be definitely marked upon the ground. Section 2329 of the Revised Statutes, providing that where lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands, simply provides where the claimant shall run the lines of his claim, and does not dispense with the requirement that the lines shall be marked or evidenced, and section 2331, providing that where placer claims are upon surveyed land and conform to legal subdivisions, no further survey or plan shall be required, does not refer to the marking of the boundaries upon the ground, but to the plan or survey which is to be filed upon the application for a patent. White v. Lee, 78 Cal. 593, 21 Pac. 363, 12 Am. St. Rep. 115 (1889).

The marking of the boundaries upon the ground is essential to the location of a placer claim, although the location be of a governmental subdivision. Anthony v. Jillson, 83 Cal. 296, 23 Pac. 419, 16 Mor. Min. R. 26 (1890).

Where a placer claim consisting of a governmental subdivision was surveyed by a surveyor who found a quarter section corner located and monumented with a pile of rocks by the government surveyor, from which he ran the lines, placing stakes two or three inches in diameter and standing a foot above the ground at each corner of the claim, it was held the claim was sufficiently marked. Temescal Oil Min. & Dev. Co. v. Salcido, 137 Cal. 211, 69 Pac. 1010, 22 Mor. Min. R. 360 (1902).

Where in the location of a quarter section as a placer claim, the stakes are set so as to leave a strip on one side, but the notice claimed the full quarter section, it was held that the location included the full quarter section, and that the strip omitted by the staking was not open to location. Kern Oil Co. v. Crawford, 143 Cal. 298, 76 Pac. 1111, 3 L. R. A. (N. S.) 993 (1904).

The requirement that the location be distinctly marked on the ground, so that the boundaries may be readily traced, applies to placer as well as to lode claims. Sweet v. Weber, 7 Colo. 443, 4 Pac. 752 (1884).

The requirement for distinctly marking the boundaries of the claim upon the ground applies to placer as well as to lode claims, and the provision of the

his knowing of said locations; and his grantees should not be permitted to take advantage of any minor defects in the location notices of said mining claims. If Oster had actual notice of the location and boundaries of said claims, neither he nor his grantees will be permitted to take advantage of some technical defect in the location notice, where it appears that said claims were located in good faith."

We think the notice in this case is sufficient under the facts of the case, as it clearly appears that Whelan, who located the Erin fraction claim for appellant, had full knowledge of the location of the Murphy fraction claim and one of the principal reasons that he gives for locating it is that on an examination of the location notice he concluded it was defective. Whelan had actual notice that the ground had been located, also constructive notice by an examination of the recorded notice, and had seen the work done by Murphy on the claim for six or seven years. It is true that Whelan also claimed that the ground was not subject to location at the time Murphy located it as the Murphy fraction, for

Revised Statutes that where the location refers to legal subdivisions no further plat or survey need be had, refers only to an application for a patent, and not to the original location of the claim. Saxton v. Perry, 47 Colo. 263, 107 Pac. 281 (1910).

Where a placer location is made upon a surveyed governmental subdivision, no marking upon the ground is necessary. Kern Oil Co. v. Crawford, 143 Cal. 298, 76 Pac. 1111, 3 L. R. A. (N. S.) 993 (1904).

The case of Kern Oil Co. v. Crawford, 143 Cal. 298, 76 Pac. 1111, 3 L. R. A. (N. S.) 993 (1904), is the only case holding that no marking of the location on the ground is required where a placer claim is located on a surveyed governmental subdivision, and is contrary to two former decisions of the same court. White v. Lee, 78 Cal. 115 (1889), and Anthony v. Jillson, 83 Cal. 296, 23 Pac. 419, 16 Mor. Min. R. 26 (1890), and to all the other cases cited in this note. The reasoning of the decision seems to be based upon the fact that section 2329, United States Rev. Stats., provides that where placer claims are located on lands which "have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of public lands," and that section 2331 provides, "where placer claims are upon surveyed lands and conform to legal subdivisions no further survey or plat shall be required," etc; but these sections have, by every other decision in which they have been construed, been held not to dispense with the necessity of marking the location on the ground. Furthermore, the decision on this point may properly be considered *obiter*, for the reason that it appears from the decision itself that it was not necessary to consider this point in deciding the case, the other point previously decided fully disposing of the case. The ground had been marked, but the stakes were so set that on one side they did not include the whole quarter section, leaving a strip on that side tapering from 24 to 73 feet wide. In the department decision it was held that this marking, taken in connection with the location notice, was a sufficient marking of the location on the ground. On the rehearing the court adopted the reasoning and finding of the department decision, and added the *obiter* point.

the reason that the ground was covered by other locations, but the trial court found against this contention. Whelan testified that after examining the notice, he concluded it was not sufficient.

The court found that the respondent had performed the assessment work on the Murphy fraction claim for nine years, beginning with 1900 and ending with 1908, and that respondent had held, worked, and was in the possession of the Murphy fraction lode for more than five years from and after August 26, 1899, the date of its location, and that during said period of time, and for more than five years after the date of said location, there was no adverse claim made to said premises or to any part thereof, and that such possession was open, notorious, exclusive, and continuous for more than six years. We think that finding is supported by the evidence. Under the facts and circumstances of this case, to permit the appellant to recover on purely technical grounds would be doing a great injustice to the respondent.

Counsel for appellant contends that the evidence is not sufficient to support the findings to the effect that respondent has been in open,

XX. Claims by Associations.

Where a mining claim is located by an association of persons, it is not necessary that the boundary of each particular location be marked on the ground. McDonald v. Montana Wood Co., 14 Mont. 88, 35 Pac. 668, 43 Am. St. Rep. 616 (1894).

XXI. Tunnel Claims.

Where discovery of a lode or vein is made in a tunnel, pursuant to Rev. Stats., section 2323, the location must be marked on the surface the same as in the case of any other location. Rico-Aspen Consol. Min. Co. v. Enterprise Min. Co., 53 Fed. 321 (1892).

Under the provisions of section 2323, United States Rev. Stats., one who has made a tunnel location and discovers a lode therein, is not bound to make a location upon the surface, but is entitled to claim 750 feet of the lode in each direction from the discovery. Ellet v. Campbell, 18 Colo. 510, 33 Pac. 521 (1893).

XXII. Adjoining Claims.

Where two adjoining mining claims were each marked at the corners by four stakes about 1 1-2 feet long, flattened on two sides and driven into the ground, two stakes being at the ends of the dividing line common to both claims and in the middle of the dividing line was a tree blazed on both sides, on one of which the notices of location were posted, describing the claims by courses and distances running from the tree to a stake and from stake to stake, it was held sufficient under section 2324, United States Rev. Stats. Eaton v. Norris, 131 Cal. 561, 63 Pac. 856, 21 Mor. Min. R. 205 (1901).

Stakes set at the four corners of each of three claims, with notice posted upon each showing its boundaries, is a sufficient marking of the claims upon the ground. Holdt v. Hazard, 10 Cal. App. 440, 102 Pac. 540 (1909).

XXIII. Under Colorado Statute.

The failure to plant stakes, as required by the Colorado Statute, will not be excused where the place where they should have been planted was not inaccessible, but merely difficult of access, under the provisions of that statute making it valid to post the stakes at the nearest practicable point, where the proper place

notorious, and adverse possession of said claim for a period of more than six years. On an examination of the evidence, we are fully satisfied that that finding is amply supported by the evidence.

The argument contained in appellant's brief is predicated upon four propositions: (1) That the Murphy fraction lode was located within the lines of the Snowdrift lode; (2) that the notice of location filed for record was void; (3) that there was no adverse possession of said Murphy lode; (4) that after the abandonment of the easterly portion of the Snowdrift location, the Erin fraction was located so as to cover such abandoned portion, and was therefore a valid location. All of the assignments of error are practically included within those contentions, and the trial court found in favor of respondent on each and every one of them and such findings are based on a substantial conflict in the evidence.

Upon a careful review of the whole record, we are fully satisfied that the findings of fact are supported by the evidence, and that the judg-

is impracticable or dangerous to life or limb. Croesus Min., Mill. & S. Co. v. Colorado Land & Min. Co., 19 Fed. 78 (1884).

Under the Colorado Statute, the marking must be by means of six substantial stakes, one set at each corner of the claim, and one at the center of each side line thereof. These stakes must be of substantial character, sunk in the ground, hewed on two sides of the corner stakes which are in towards the claim and the side stakes hewed on the side which is in toward the claim. Cheesman v. Shreeve, 40 Fed. 787, 17 Mor. Min. R. 260 (1889).

A claimant who has not kept up his boundary posts will not be permitted to show the courses and distances of his recorded location to be erroneous when the right of an intervening locator without notice will be prejudiced. It is reasonable to say that the statutory requirements respecting the marking of the surface boundaries with posts are so far imperative as to require that the boundaries may be in the language of the statute, "readily traced" by them, and that the notice which the statute contemplates, and seeks by and through them, may not be substantially impaired by any omission; but it does not necessarily follow that the failure to place the side posts in the center of the side lines will invalidate the location. Such an omission might exist with all the corner posts properly placed and the lode exposed and worked the entire length of the claim. Pollard v. Shively, 5 Colo. 309 (1880).

If a stump of sufficient size and stability stands at a point where a statutory post should be located, there is no good reason why it should not be hewed, marked, and adopted as a location post. In such case, however, the descriptive survey should give both its real and assigned character, otherwise it would not satisfy the call of a location certificate for a post. Pollard v. Shively, 5 Colo. 309 (1880).

The Statute of Colorado provides that surface boundary shall be marked by six substantial posts hewed or marked on the side or sides which are in toward the claim, and sunk in the ground, to-wit, one at each corner and one at the center of each side line. Where it is practically impossible on account of bed rock to sink such posts, they may be

ment must be affirmed and it is so ordered. Costs are awarded to the respondent.

STEWART and AILSHIE, JJ., concur.

On Petition for Rehearing.

SULLIVAN, C. J. A petition for rehearing has been filed in this matter, whereby it is contended that the rule laid down in this case is in conflict with the rule laid down in the case of Nicholls v. Lewis & Clark Min. Co., 18 Idaho 224, 109 Pac. 846 (decided at this term).

After a careful examination of both opinions, we are unable to find any conflict between the rules laid down therein. Counsel for appellant also contends that the rule laid down in subdivisions 4, 7, and 8 of the syllabus is not the rule that should obtain in this state, and if it is the established rule it will lead to many conflicts and disturbances among mineral claimants, and that it would be unjust to require a locator of a mining claim when informed by another mineral claimant that his claim is excessive, to then and there relinqush the excess; that such a rule would be unfair to the excessive claimant. Counsel thus contends

placed in a pile of stones; and where, in marking the surface boundaries of a claim any one or more of such posts shall fall by right upon ground where the proper placing of it is impracticable or dangerous to life or limb, it shall be legal and valid to place any such post in the nearest practicable point, suitably marked to designate the proper place. Under this statute no stake or post was placed at one corner of a location but the letter "S" was cut into the solid rock at a point 27 degrees northwest from the corner itself and at a certain distance designated in the location certificate. This was held to be insufficient to constitute a compliance with the statute. Taylor v. Parentau, 23 Colo. 368, 48 Pac. 505, 18 Mor. Min. R. 534 (1897).

Under the Statute of Colorado requiring stakes at the corners of the claim, the fact that one corner falls upon a railroad embankment is no excuse for failure to place the stake, unless it would have been so close to the track as to interfere with passing trains. Beals v. Cone, 27 Colo. 473, 62 Pac. 948, 83 Am. St. Rep. 92, 20 Mor. Min. R. 592 (1900).

The provisions of the Colorado Law requiring the marking of the location by stakes planted in the ground are not in conflict with the Federal Statute, but are additions thereto made under the inferential grant of power conferred by sections 2322 and 2324 of the United States Rev. Stat. Saxton v. Perry, 47 Colo. 263, 107 Pac. 281 (1910).

XXIV. Under Ontario, Canada, Statute.

If the land is not staked as required by the act, it is abandoned and open for staking by another party. Re Milne v. Dryman, Ont. Min. Com. Dec. 455 (1909); Re McDermott and Dreany, Ont. Min. Com. Dec. 4 (1906).

Staking will not be invalidated by putting wrong license number on post by mistake. Re Haight, etc., Ont. Min. Com. Dec. 2 (1906).

Substantial compliance, as nearly as circumstances will permit, with the act is sufficient where the surveys are uncer-

in effect, that it should be left to the discretion of the one who claims an excessive area of surface ground in his mining claim when he should relinquish the excess.

We cannot agree with that contention. Under the law, a locator should not be permitted to hold an excess of ground with a single location, and when his notice provides that his mining claim extends a certain number of feet in a certain direction from the discovery, subsequent locators may be governed by the statement in the notice and not by stakes that include within their boundary an excess of surface ground. We are not inclined to depart from the rule laid down in the opinion in this case.

Our attention has been called to the fact that the Snowdrift claim was located under the provisions of sections 3101 and 3102, Rev. St. 1887, instead of under the provisions of section 3207, Rev. Codes, and under the provisions of said section 3101 the notice of location was required to be conspicuously attached to one of the center end stakes instead of being posted at the place of discovery; but that would make no difference so far as the rule laid down in this opinion goes. It was, in fact, posted at the discovery and not on the center end stake, and recited that the claim extended seven hundred feet in a northwesterly

tain. In re Willington & Ricketts, Ont. Min. Dec. 58 (1907).

Staking with posts smaller than those required by law and not marked as required is not a substantial compliance with the act. Re Willington & Ricketts, Ont. Min. Com. Dec. 58 (1907).

Where staking is not made as required by the act, the claim is abandoned and subject to staking by another qualified party. Re Cashman and The Cobalt & James Mines, Limited, Ont. Min. Com. Dec. 70 (1907).

The staking must be proceeded with promptly or rights will be lost to a subsequent discoverer who completes his staking first, and it was held that a delay from the morning of one day to the afternoon of the next, when the staking might have been completed the same day, was a fatal delay. Re Mackay and Boyer, Ont. Min. Com. Dec. 83 (1907).

While it is safer to make all new markings of lines, the adoption of old lines when putting up newly marked posts is a substantial compliance with the act. Re Reichen & Thompson, Ont. Min. Com. Dec. 88 (1907).

Mistake in marking number one post 1250 feet instead of 910 feet from discovery, held not to invalidate the claim. Re Gray and Bradshaw, Ont. Min. Com. Dec. 139 (1907).

Staking must be done as soon as reasonably possible or rights will be lost to a subsequent discoverer. Re Reichen & Thompson, Ont. Min. Com. Dec. 88 (1907); Re McLeod & Enright, Ont. Min. Com. Dec. 149 (1908).

It seems nothing but inability to complete the actual staking out of a claim will excuse delay, and it was held that where a discovery post was planted on September 10th, and the staking not completed till September 24th, one who made discovery on September 14th, and completed his staking, had the better right. Re Prombley and Ferguson, Ont. Min. Com. Dec. 189 (1908).

A delay in staking is fatal to the validity of the claim only where the rights of some other party intervene.

direction from the notice and discovery, and eight hundred feet in a southeasterly direction therefrom, and under that notice, he was only entitled to eight hundred feet in a southeasterly direction from the discovery point.

Some question is raised in regard to newly-discovered evidence and the admission of counter affidavits. The newly-discovered evidence consisted of field notes, plat, and surveys of the Buffalo and Parret fraction lodes. Upon an examination of those, we are fully satisfied that the decision of this court would not have been different from what it now is had that evidence been introduced on the trial. We do not think, as contended by counsel, that this newly-discovered evidence, had it been introduced on the trial, would have entitled appellant to recover this action.

No sufficient reason appearing why a rehearsal should be granted, the application is denied.

AILSHIE, J., concurs.

Re Monroe and Downey, Ont. Min. Com. Dec. 193 (1908).

Former markings of same party may be used to assist new staking, but the practice is dangerous. Re Henderson & Ricketts, Ont. Min. Com. Dec. 214 (1908).

Using tree instead of No. 1 post, which tree is ten feet from the corner and not squared or cut off so as to resemble a mining post, is not a substantial compliance with the law. Re Smith & Pinder, Ont. Min. Com. Dec. 241 (1908).

The omission of the planting of three of the corner posts and the blazing of the lines, renders the staking of a mining claim void. Re Milne & Gamble, Ont. Min. Com. Dec. 249 (1908).

A claim is invalidated by failure to plant posts with license number thereon, as required by the act. Re Mac Cosham & Vanzant, Ont. Min. Com. Dec. 277 (1908).

A mining claim is invalidated by failure to put up discovery post. In re Smith & Kilpatrick, Ont. Min. Com. Dec. 314 (1908).

A mining application was held invalid for failure to mark applicant's name and license number on certain of the posts, and to do fresh blazing. In re Spurr, etc., Ont. Min. Com. Dec. 390 (1909).

Neglecting to number two of the corner posts, and to freshly blaze the lines, works an abandonment and leaves the land open to location. In re Kollmorgen & Montgomery, Ont. Min. Com. Dec. 397 (1909).

Planting discovery post outside of claim as applied for, although within it as marked on the ground, the boundaries being erroneously marked, renders claim invalid. Re Burd & Paquette, Ont. Min. Com. Dec. 419 (1909).

Failure to mark name and license number and description of lot on posts, renders staking invalid. In re Burd & Paquette, Ont. Min. Com. Dec. 419 (1909).

JENNINGS et al. v. DAVIS.

[Circuit Court of Appeals, Fourth Circuit, May 13, 1911.]

187 Fed. 703.

1. Pipe Lines—Degree of Care.

A pipe line is not a nuisance, and liability for fire caused by the escape of oil is limited to a failure to exercise ordinary care in view of the dangerous character of the product conveyed.

2. Same—Instructions.

An instruction that oil pipe line proprietors are bound to use a degree of care in proportion to the risk of danger attending the handling of such substance is erroneous, because capable of being interpreted as requiring too high a degree of care.

3. Same—Res Ipsa Loquitur.

The doctrine of *res ipsa loquitur* is not applicable to the blowing out of a gasket in a joint of a pipe line, thereby permitting the escape of oil.

4. Same—Duty to Prevent Injury from Leaks.

The owner of a pipe line upon being notified of the escape of oil is bound to take precautions to prevent its being ignited by the usual and legitimate use of the premises.

5. Same—Escaped Oil—Negligence.

Lighting a fire in the forge of a blacksmith shop with notice of the dangerous proximity of oil which escaped from a pipe line, and permitting pieces of hot iron to fall through cracks in the floor, igniting such oil, constitute negligence.

6. Same—Fires—Intervening Causes.

The ignition of oil through the negligent act of a blacksmith in lighting a fire in his forge with knowledge of the accumulation beneath his premises of oil escaping from a pipe line, held the proximate cause of the destruction of the premises of a third person.

7. Negligence—Proximate Cause.

Where the evidence is uncontroverted and but one inference could be drawn, the question of proximate cause is for the court.

In error to the Circuit Court of the United States for the Northern District of West Virginia, at Clarksburg.

NOTE.

Operation of Oil Wells as a Nuisance.

Opening a gate in a gas well to permit the gas to blow off accumulations of water does not render it a nuisance *per se;* but where the well is located near a highway and the operation is calculated to frighten horses, due care must be exercised to prevent injury therefrom. Snyder v. Philadelphia Co., 54 W. Va., 149, 46 S. E. 366, 63 L. R. A. 896, 102 A. S. R. 941.

It will not be presumed that an oil well in process of construction 150 feet from a dwelling house will become a nuisance when completed, and its construction will not be enjoined. Windfall Mfg. Co. v. Patterson, 148 Ind. 414, 47 N. E. 2, 37 L. R. A. 381, 2 A. S. R. 532.

Action on the case by John W. Davis against E. H. Jennings and others, doing business under the firm name of the Producers' & Refiners' Oil Company. Judgment for plaintiff. Defendants bring error. Reversed.

For plaintiffs in error—Thos. P. Jacobs and Eugene Mackey.

For defendant in error—John Bassel (Charles G. Coffman, on the brief). .

Before GOFF and PRITCHARD, Circuit Judges, and CONNOR, District Judge.

CONNOR, District Judge. This is an action on the case instituted in the circuit court of Wetzell county and removed into the Circuit Court of the United States for the Northern District of West Virginia. The purpose of the action is to recover damages sustained by the alleged negligence of the plaintiffs in error, hereinafter called defendants, by the destruction of the property of defendant in error, hereinafter called plaintiff. The cause was duly brought to trial before the court and jury. From a judgment upon a verdict for plaintiff, defendants duly assigned error and brought the record to this court for review.

The facts, in regard to which there was no substantial controversy, disclose this case: Plaintiff was on and prior to December 8, 1903, the owner of a dwelling used as a boarding house, a barn, and another house used as a blacksmith shop by some person not under the control of plaintiff. All of said buildings were located on a farm leased by plaintiff in Wetzell County, W. Va. Defendants, residents of the state of Pennsylvania, owned a pipe line used to convey petroleum oil from the place of production in Wetzell County to Pittsburg, Pa. They maintained a six-inch trunk oil pipe line laid along the north side of the public road upon the same side on which plaintiff, subsequent to the laying of the pipe line, built the

Intervening Causes of Explosion.

Where owing to defective construction of a gas well, escaping gas accumulated in the basement of a building, being ignited from an unknown cause, plaintiff's intestate being killed by falling walls while in an adjoining building, it was held that defendant having set a dangerous agency in motion was liable irrespective of what caused the ignition of the gas. Coffeyville Mining & Gas Co. v. Carter, 65 Kan. 565, 70 Pac. 635.

See also Koelsch v. Philadelphia Co., 152 Pa. 355, 25 Atl. 522, 18 L. R. A. 759, 34 A. S. R. 653, where it was held that the negligence of a third person in igniting gas negligently permitted to escape was not an intervening cause.

The principal case seems to have varied from the rule as to intervening causes, breaking the sequence of the original wrongful act as laid down in the Squib case (Scott v. Shepard, 3 Wils. 403, 2 W. Bl. 892) and a long line of cases since that decision was announced. See Cooley on Torts, p. 104.

houses described in the declaration. A mile or so west of said buildings, defendants maintained at West Grove a pumping station which forced the oil through the six-inch pipe into Pennsylvania, its final destination. At about 75 feet of plaintiff's house, defendants had inserted a Y joint, into which ran and connected a four-inch branch oil pipe line running off at an angle and in a northwesterly direction to Wileyville pumping station, distant about a mile from the Y connection. In the four-inch branch line, about five feet from the connection, was inserted a flange or joint, the two parts of which were drawn and fastened together with bolts, and for the purpose of making a close connection, which could not be made with the metal, a thin piece of rubber—from a sixteenth to a thirty-second of an inch in thickness and technically called a gasket—was inserted between the faces of the two halves of the flange. When the bolts were tightened, the rubber was flattened, and the connection made tight and safe. Between the flange and the Y connection, in the six-inch main line, was installed a gate or valve operated by a wheel on top, which, when turned, closed the valve and stopped the flow of oil through the four-inch line. Defendants employed a man whose duty it was to make daily inspections of the four-inch and of this flange. The Wileyville pump station on the four-inch line and the Pine Grove station on the six-inch line could not be operated at the same time. The defendants operated the Wileyville station during the day, shutting it down about 6 o'clock in the evening, and operated the Pine Grove station during the night.

On the night of December 7, 1903, at about 8 o'clock, Mrs. Adams, who in the absence of plaintiff looked after his boarding house, in stepping from the front porch of the house discovered oil upon the ground which came from a leak in the flange. She telephoned the operator at Pine Grove station that oil was escaping, and that it might result in serious injury or some serious accident. She testified that someone at the station at Pine Grove answered, requesting her to ascertain where the break in the line was—that she sent three men to look for the leak, and they informed her that it was in the four-inch line near the junction with the six-inch line—and that she immediately telephoned this information to the station. Mr. Maxwell testified that he had charge of the barn; that he reached there about 8 o'clock on the night of December 7, 1903, and discovered that oil was escaping and running around the house and barn to such an extent that he regarded it as dangerous, and at once directed the outdoor lights between the barn and the house to be put out, and directed that all lights and fires be kept out of the stables and from around the house; that he at once telephoned the Pine Grove station, notifying the men there that oil was escaping, and that attention should be given the

matter at once; that there was danger of burning the property; and that someone answered that they would have the matter looked after. There was evidence on the part of plaintiff that two persons at the house heard the pulsating or throbbing of the pump until late at night. Defendants' witness, Robert Rynd, testified that he was in the employment of defendants as one of the "connection gang"; that he had made it his business to go over that line every day; that he was away on December 7, 1903, at other work, and did not get in until about 7:30 o'clock; that he went up the line before he ate supper to see that it was all right; that he went to the place of the leak, found oil on the ground; it was caused by the gasket blowing out of the flange—in the four-inch line—about four or five feet from the junction with the six-inch line; that there was a gate or valve between the flange and the six-inch line. He describes this as:

"A casting made on the same principle as the valve on a range. It has a stem, with a wheel on one end and a sliding valve at the other end. When you turn the wheel and open the valve the oil goes through, and, when you turn it the other way, it closes the valve, so that nothing can get through. I closed the gate the first thing—tight—with a stick—that is, put a stick in the spokes of the wheel so that I could make it tight. It could not leak at all; it was impossible. The Wileyville pump station is on the four-inch line about half a mile away—perhaps a little more. This pump was not working when I got to the flange."

He said that he could not repair the leak that night very well, the oil made it dangerous, danger of igniting; that he went there the next morning shortly after 7 o'clock to repair the leak, took the line apart, took out the bolts, and put in a new gasket, screwed up the bolts, and tightened the flange. That, when he tightened up the valve the night before it took the pressure off the four-inch line. He estimates that about two or three barrels of oil leaked out before he got to the leak; that he had been going over the line daily to see that it was all right—that it was in good condition. He described the gasket as a thin rubber packing—the thinner the better—that goes in between the flanges. He says that only a part of the gasket had blown out "about the size of a darning needle or maybe not so large." It was very small—hardly noticeable. He said that there would be no throbbing—probably a little "sizzling noise"—just like water being forced out of a little hole. The other witnesses introduced by defendants corroborated this witness in regard to the construction of the pipe line, flange, gate, gasket, and its condition when examined, etc. Plaintiff introduced no testimony upon this phase of the case.

Rynd also testified that he went to plaintiff's house the next morning, saw the oil; that it ran "around below the house and then down along the line about 200 feet; that it stopped under the blacksmith shop, could see it on the ground and under the shop floor, about two feet from

the ground." He also testified that he went to plaintiff's house the night of the 7th of December, saw woman there; that she told him the oil had been escaping and running under the house; that he knew this from what he saw at the line. "She said she had already called there, so I made sure and called there myself again to see if they were shut down and they were. I called up Piney Grove." Nothing was done in regard to the oil that night. It was dark at half past 7; went there next morning at daylight. The uncontradicted testimony showed that on the morning of December 8th, at about 8 o'clock, the blacksmith, Cross, came to the shop and made a fire in his forge, and, for the purpose of shoeing a horse for a customer, heated a piece of iron, placed it upon the anvil and cut off a part of it, which fell on the floor, rolled through a crack into the oil under the shop, causing a fire which instantly followed the oil up to the barn and house, resulting in their destruction in a few minutes. It was shown by plaintiff's witness that, in order to get into the shop, he was compelled to step over the oil, as it ran under the floor—"it was a kind of jelly all around there"—that Cross came in the same way as witness; could not get in any other way. "He had to walk in it to get in the shop."

Winger, defendants' witness, says that he went to the shop about the time that Cross came, saw the oil, and told Cross not to put fire in his forge; that it was dangerous.

Bessey, another witness for defendants, says that he saw Cross lighting some shavings to start a fire in the forge as he passed the door—that he was using a match. "I told him it was not safe to build a fire in there until we had gotten the oil from under the shop—he turned his face to me and kind of smiled and went right on to building the fire." This witness was in defendants' employment.

Horner, another witness for defendants, says that he heard Winger tell Cross not to make a fire in the forge. Plaintiff's witness Hurley, who had brought the horse to be shod, says that he was there at the time Cross built the fire, and that he did not hear the witnesses tell him not to build the fire. Cross was not introduced.

At the conclusion of the testimony, defendants requested the court to instruct the jury to find for defendants, which was refused. Defendants excepted and assigned such refusal as error. Plaintiff asked the court to instruct the jury:

"That, where parties are handling or transporting substances that are liable to cause serious injury from explosion or by destroying property by reason of contact with fire, then the duty is devolved upon the person or persons handling or transporting such substances to use a degree of care in proportion to the risk or danger attending the handling or transportation of such substances."

Which was given, and defendants excepted and assigned error.

The defendants requested the court to instruct the jury:

"If they find that the blacksmith, Cross, had knowledge of the existence of the oil about and under his shop, and of the danger of building a fire in his forge, and having such knowledge, did build a fire in his forge, and heat therein an iron until red hot, and cut therefrom a small piece, which falling through a crack in the floor, set fire to the oil underneath, the jury is instructed that such act of the blacksmith was negligence on his part, and was the intervening, efficient cause of the fire, and the plaintiff cannot recover, and the verdict of the jury must be for the defendants."

Which was refused, and the defendants excepted and assigned error.

Defendants further requested the court to instruct the jury:

"That if they find that the building of a fire in the blacksmith's shop and the heating therein of the horseshoe and cutting the same off and permitting the same to fall, in red hot condition, into the escaped oil on the ground under the shop and that the fire which burned plaintiff's property ignited therefrom, that the said acts of said blacksmith are the proximate cause of the fire, and plaintiff cannot recover."

This was refused, and defendants excepted. Defendants requested the court to instruct the jury:

"That, if they find from the evidence that the negligence of the blacksmith was the proximate cause of plaintiff's injury and damage, then there can be no recovery against defendants."

This was refused, and defendants excepted and assigned error.

Other requests for instruction were refused, but, in the view which we take of the case, those set forth with the instructions given present the material contention of the defendants.

The record does not present the question discussed and decided in Rylands v. Fletcher, L. R., 3 H. L. 330, as modified by Nichols v. Marsland, L. R., 10 Exch. 255, because no damage resulted from the fact that the oil escaped and run upon the plaintiff's premises. The action is not for damage sustained by the trespass, but for the injury which resulted from the ignition of the oil on the premises. The defendant company was not guilty of a nuisance in maintaining its pipe lines. It was engaged in a legitimate business. Hence the doctrine of "absolute care," or, as sometimes expressed, the "wild beast" theory, is not applicable. Beven, Neg. 399. Liability is therefore dependent upon the existence of negligence, which may arise either by defective construction of the pipe and connections or failure to make a proper inspection. The measure of duty in such cases is well stated in Gas Co. v. Wellman, 114 Ky. 79, 70 S. W. 49, 1 Am. and Eng. Ann. Cas. 64, citing Nichols v. Marsland, *supra*. "If the person who has collected the water has done all that reasonable care and skill can do, he is not liable for damages over which he has no control, and that a distinction must be drawn between

the keeping of a tiger or other dangerous wild beasts which get loose accidentally or by the fault of others, and a reasonable use of property in a way beneficial to the community. * * * The authorities lay down the rule that, as gas is a useful article, almost indispensable in modern life under many circumstances, the manufacture and sale of it is not an illegal act, and that the company in supplying this necessity to its customers is bound only to exercise such care and skill in its management as the dangerous character of its substance, and the attending circumstances, demand of a person of ordinary prudence." Goodlander Mill Co. v. Standard Oil Co., 63 Fed. 400, 11 C. C. A. 253, 27 L. R. A. 583. It will be observed that the learned judge instructed the jury that the law imposed the duty "to use a degree of care in proportion to the risk of danger attending the handling or transportation of such substances." While we are quite sure he did not so intend, the language quoted is capable of being interpreted by the jury as calling upon the defendant to use such a degree of care to prevent leaks as was necessary to accomplish that result, under all conditions. The correct rule, as laid down by the Supreme Court of the United States, and by a very large majority of the courts of the states, is that:

"Negligence has always relation to the circumstances in which one is placed, and what an ordinarily prudent man would do or omit in such circumstances." Charnock v. Texas Pac. Ry. Co., 194 U. S. 432, 24 Sup. Ct. 671, 48 L. Ed. 1057.

The standard of duty is that of the conduct of a reasonable and prudent man. "The duty is dictated and measured by the exigencies of the occasion." Railroad v. Jones, 95 U. S. 439, 24 L. Ed. 506. Referring to the authorities, Mr. Justice Field, in Nitro Glycerine case, 15 Wall. 524, 21 L. Ed. 206, says:

"The rule deducible from them is that the measure of care against accident, which one must take to avoid responsibility, is that which a person of ordinary prudence and caution would use if his own interests were to be affected, and the whole risk were his own." 14 Am. & Eng. Enc. 936.

Tested by these principles, we think it very doubtful whether any sufficient evidence of a breach of duty on the part of defendant is disclosed by the record. There is no suggestion that the construction of the pipe line or the method of making the connection was improper or unscientific; nor that the gasket was not the usual and proper method of securing a perfect and safe connection. Unless the fact that it "blew out" as testified to was of itself evidence of either defective material or unusual pressure, or negligent absence of inspection, imposing upon defendant the duty to explain the leakage, or, in other words, that the fact of leakage brought the case within the doctrine of *res ipsa loquitur*, the plaintiff failed to show any breach of duty on the part of defendant.

We are of the opinion that the mere fact that a leakage was caused by the blowing out of the gasket does not constitute evidence of negligence in the construction, operation or quality of the materials used. The testimony fails to discover any negligence in regard to inspection or prompt correction of the condition which caused the leak. In this connection defendant requested the court to instruct the jury:

"That, if they shall find from the evidence that the blowing out of the gasket was an unforeseen and unavoidable accident, they must find for the defendant."

This request was refused, and such refusal is assigned for error. The refusal to give this instruction deprived the defendant of a defense to this aspect of the case to which it was entitled. It was equivalent to holding the defendant to the absolute duty to prevent leakage; in other words, an insurer against accident. Conceding this to be true, plaintiff insists that, after defendant's employees were notified that the oil had escaped and run upon the premises, the duty was imposed to either promptly remove it, or by covering it with dirt to prevent its being ignited by the usual and legitimate use of the premises. In this we concur. The evidence tends to show, without contradiction, that it would have been impracticable and dangerous to interfere with the oil as it had run upon the ground on plaintiff's premises during the night. Whether defendant under the circumstances should have placed a watch upon the premises during the night, is immaterial, as no injury resulted from its failure to do so.

We are thus brought to consider the determinative question presented by the record. Assuming that defendant was negligent in failing to cover the oil, or remove it, at the earliest practicable time, and that, by permitting it to remain in the condition described on the following morning, it was liable for any injury to the premises which proximately resulted from the condition produced by the presence of the oil, the question arises, was the ignition of the oil, under the circumstances disclosed, a natural and proximate result of such condition, or was it the result of the act of an intervening, independent agent? Defendants' prayers are based upon the assumption that the jury find that the blacksmith, Cross, had knowledge that the oil had run under the shop, and, with such knowledge, built a fire in the forge, heated a piece of iron, placed it on the anvil, and cut therefrom a small piece which fell upon the floor and through a crack therein, coming in contract with the oil under the shop, ignited it, and thereby caused the destruction of plaintiff's property. It will be observed that the prayers involve the finding that the blacksmith was not only an intervening, independent agent, but that he was negligent, in that he knew of the conditions which rendered it dangerous to pursue the course which resulted in the injury. The appearance of

the oil at the time the blacksmith reached his shop early on the morning of December 8th and his conduct are disclosed by plaintiff's evidence. The only controverted testimony relating to this phase of the case is that of defendants' witness, who says that he told Cross not to make a fire in the forge—that it was dangerous—and the evidence of plaintiff's witness, who was present, and says that he did not hear the warning. Cross was not introduced. Assuming that no warning was given him, we have the uncontradicted testimony of plaintiff's witnesses that, when Cross reached the blacksmith shop, he could not go into it without seeing the oil on the ground and that "he had to walk in it to get into the shop," that he therefore knew the conditions when he made a fire, heated and cut the iron. It would seem that no two reasonable minds could differ in reaching the conclusion that this was a dangerous thing to do—certainly the conditions, in the light of which he was acting, imposed upon him the duty to use ordinary care to avoid the danger of igniting the oil under the shop. Every person on the premises recognized and met this duty from the moment the oil was found to be on the premises. It would seem to be clear that Cross was guilty of negligence. This fact does not, however, necessarily exonerate defendants. His negligence may have been only concurrent with that of defendants, and both may be liable.

The question therefore remains whether the negligence of Cross was the proximate cause of the injury—that is, whether his negligence intervened and insulated the defendants' negligence. In the solution of this question recourse must be had to certain well settled principles. Every one guilty of negligence is liable for all damage which proximately results therefrom, whether anticipated by him or not. The question of reasonable anticipation of the particular injury which his negligent breach of duty produces is not open to him. Where one is guilty of a breach of duty resulting in injury to another, to whom he owed the duty, "in the absence of a sufficient and independent cause operating between the wrong and the injury, the original wrong must be considered as reaching to the effect, and proximate to it." Railroad v. Kellogg, 94 U. S. 469, 24 L. Ed. 256. When, however, it is suggested that some independent cause intervened between the wrong and the injury complained of, other principles must be invoked. Mr. Justice Strong, in Railroad v. Kellogg, *supra*, states the principle clearly. He says:

"The question always is: Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application, but it is generally held that, in order to

warrant a finding that actionable negligence or an act not amounting to wanton wrong is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of attending circumstances."

Confusion sometimes arises, and is found, in decided cases, regarding the doctrine of anticipated results of negligence. If from my negligent act or omission of duty injury results, in the absence of any intelligent, responsible, intervening cause, the law attributes the injury to my negligence, and I will not be heard to say that I did not anticipate that the particular injury would result from my wrongful act or breach of duty. In such cases the question is simple and the liability easily settled. If, however, between my breach of duty and the injury, some other agency—either wrongful or otherwise—intervene, and I seek to escape liability, and fix it upon such intervening agency, the question arises whether or not I shall be held to have reasonably anticipated the intervention or the existence of the condition from which the injury resulted, and at this point the doctrine of prevision or anticipation enters into the problem, or, as said in Kellogg's case, "where there is a sufficient and independent cause, operating between the wrong and the injury the resort of the sufferer must be to the originator of the intermediate cause. The inquiry must therefore always be whether there was any intermediate cause disconnected from the primary fault and self operating which produced the injury." Kellogg's case, *supra*. If the intermediate cause is one which the negligent party should have reasonably anticipated, it is not "disconnected." Dr. Wharton, after stating the general principle, says:

"Reserving for another point the consideration of consequences resulting from the indefinite extension of vicarious liability, we may now ask whether, on elementary principles, the action of an independent free agent, taking hold unasked, of an impulse started by us, and giving it a new course, productive of injury to others, does not make him the juridical starting point of the force so applied by him; so far as concerns the party injured? For the spontaneous action of an independent will is neither the subject of regular, natural sequence nor of accurate precalculation by us." Whart. Neg. 138.

"If the intervening cause be of such a nature that it would be unreasonable to expect a prudent man to anticipate its happening, he will not be responsible for damage resulting solely from the intervention." Barrows, Neg. 17.

The latest English writer on negligence, after a careful review of the decided cases, says:

"The principle that to fix liability for injuries brought about through a complicated state of facts, the last conscious agency must be sought, and the consideration that if, between the agency setting at work the

mischief and the actual mischief done, there intervenes a conscious agency which might or should have averted mischief, the original wrongdoer ceases to be liable." Beven, Neg. 53.

In Scheffer v. Railroad Co., 105 U. S. 249, 26 L. Ed. 1070, plaintiff's intestate while a passenger was injured in a sleeping car. It was alleged that by reason of the injuries sustained he became insane and committed suicide. Sustaining a demurrer to the declaration, Mr. Justice Miller said:

"The suicide of Scheffer was not a result naturally and reasonably to be expected from the injury received on the train. It was not the natural and probable consequence, and could not have been foreseen in the light of the circumstances attending the negligence of the officers in charge of the train."

In Cole v. German, etc., Soc., 124 Fed. 113, 59 C. C. A. 593, 63 L. R. A. 416, Sanborn, Circuit Judge, in an exhaustive and well sustained opinion, says:

"An injury which could not have been foreseen nor reasonably anticipated is not actionable, and such an act is either the remote cause, or no cause whatever of the injury." Fawcett v. Railroad Co., 24 W. Va. 759; Teis v. Smuggler Mining Co., 158 Fed. 260, 85 C. C. A. 478, 15 L. R. A. (N. S.) 893.

In Railway v. Calhoun, 213 U. S. 8, 29 Sup. Ct. 322, 53 L. Ed. 671, Mr. Justice Moody says:

"The law in its practical administration in cases of this kind regards only proximate or immediate, and not remote causes, and in ascertaining which is proximate and which remote refuses to indulge in metaphysical niceties. Where in the sequence of events between the original default and the final mischief an entirely and unrelated cause intervenes, and is of itself sufficient to stand as the cause of the mischief, the second cause is ordinarily regarded as the proximate cause, and the other as the remote cause. This is emphatically true where the intervening cause is the act of some person unrelated to the original actor. * * * If the misconduct is of a character which, according to the usual experience of mankind, is calculated to invite or induce the intervention of some subsequent cause, the intervening cause will not excuse him, and the subsequent mischief will be held to be the result of the original misconduct. This is upon the ground that one is held responsible for all the consequences of his act which are natural and probable, and ought to have been foreseen by a reasonably prudent man."

There being no such relation between the blacksmith and plaintiff as would make the latter responsible for the former's negligence, there is no element of contributory negligence involved. Cross was, in respect to both parties, an independent, unrelated agent. His act was negligent. The sole question, therefore, is whether such negligence was concurrent or independent of that of the defendants and this depends upon whether defendants ought reasonably to have foreseen or antici-

pated that he would go to the shop in the early morning—see the oil as it lay upon the ground and ran under the shop—light the fire—heat the iron—cut off a piece in such way as to cast a part, red hot, upon the floor, in which was a crack, through which it would probably fall into the oil producing the result for which it is sought to hold them liable. There is no suggestion that defendants' employees knew that the building was used as a blacksmith shop or of Cross' habit in the use of it, unless we take the testimony of defendants' witness and this is, upon the plaintiff's theory, to be eliminated. We are of the opinion that, taken in the aspect most favorable for plaintiff, the act of Cross was that of an independent, intervening agent for which defendants were not responsible, and therefore the proximate cause of the destruction of the property. The learned judge instructed the jury, among other things:

"That if they believed from all the evidence in the case, and the circumstances disclosed by such evidence, that the blacksmith, Cross, with full knowledge of the danger, negligently and without proper care, caused the piece of hot iron to ignite the oil underlying his shop, then his act would be the intervening cause; but, if the jury believe from the evidence that such act was not negligently, and without proper care, done, it would not constitute such intervening cause and as to this the jury alone must determine from the evidence."

In the view which we take of the uncontroverted testimony, the conduct of Cross was negligent. While it is true that ordinarily the question of proximate cause is for the jury, it is equally true that, where the evidence is uncontroverted and but one inference should be drawn, the question is one of law for the court. The record brings the case within this principle. Cole v. German Sav. & Loan Co., 124 Fed. 113, 59 C. C. A. 593, 63 L. R. A. 416; Teis v. Smuggler Mining Co., 158 Fed. 260, 85 C. C. A. 478, 15 L. R. A. (N. S.) 893.

For the reasons set out, we are of the opinion that the judgment should be reversed and a new trial ordered.

Reversed.

WHEELDEN v. CRANSTON.

[Supreme Court of British Columbia, December 9, 1905.]

12 Brit. Col. 489.

1. Mines—Working Claim—Building Cabin.

Building a cabin for living purposes on a placer claim is, under Act of 1882, a representation and bona fide working of claim.

2. Same—Rock-Cut.

Bona fide construction of rock-cut and drain through adjoining claim, and working that part of same, is a working of claim in question.

3. Same—Abandonment of Placer Claim—Relocation.

Formal notice of abandonment of placer "creek claim" with attempted location under act then repealed held not necessary to a valid location under Act of 1901.

4. Same—Marking Boundaries—Posts.

One post may be used to designate two placer claims with coterminous boundaries.

5. Same—Purpose of Placer Act.

Purpose of section 49 of the Placer Act is to protect the rights of surrounding owners and the crown.

6. Same—Damages for Attempted Relocation.

Attempted location of claim upon an existing one held to entitle plaintiff to nominal damages, in absence of evidence of special.

7. Same—Injunction against Relocation.

Perpetual injunction held to lie against one attempting to locate a claim upon an existing one.

Trial before MARTIN, J., at Nelson, on the 8th of December, 1905.

On the 3d of December, 1904, the plaintiff located a placer claim situate on 49 Creek near Nelson, B. C., which claim he called the Owl. This claim he recorded at Nelson on the 6th of December, 1904. Upon the 11th of September, 1905, the defendant located over this claim a placer claim called Golden Dawn, which he recorded on the same day.

The defence was that the plaintiff had located the ground covered by the Owl on the 1st of December, 1904, under the same name, viz.: Owl. which was in existence when the plaintiff on the 3d day of December, 1904, located the Owl first above named. Further defences were set up on the trial as follows: the plaintiff had not represented and bona fide worked the Owl claim since the location thereof, and it had lapsed; to

NOTE.

As to necessity of marking location on the ground generally, see note to Flynn Group Mining Co. v. Murphy, *ante*, p. 619.

which the plaintiff urged that while he had not been actually mining on the claim, he built trails and a cabin upon the same, and was engaged in digging a cut through the adjoining claims with the consent of the owners, which cut was necessary in order that he might get a tail race for his flumes, etc., and thus mine the Owl claim. In reply to the defence first named, he said that the Owl located on the 1st of December, 1904, was improperly located, and hence not a placer claim, and need not be abandoned in order that the Owl located on the 3d of December, 1904, and now claimed under, might be located.

For plaintiff—S. S. Taylor, K. C.

For defendant—A. M. Johnson.

MARTIN, J. Several questions on the Placer Mining Act are raised herein, and I shall dispose of them in their order.

First. It is objected that the plaintiff has not "represented and bona fide worked * * * continuously, as nearly as practicable during working hours" the placer claim the Owl, in question, while he was engaged in building his cabin on the claim in which to live while working it. This point has already been answered in favor of the plaintiff by the judgment of this court in Woodbury v. Hudnut (1884), 1 B. C. (Pt. 2) 39 at pp. 41, 42, 1 M. M. C. 3 at page 34, wherein it is laid down as follows:

"It was said that the work to be done on a claim (which is to be worked continuously) must be miner-like work—that building a house is not miner-like work at all; and, moreover, that the house in question was not on the Kootenay Chief ground at all, though not far off. Now, of course, in Cornwall or Northumberland, building a house is not miner's work—it is not mining at all. In old and highly organized countries the landlord mines with hired labor, and puts up houses for his men. Yet the cost of those houses is just as much part of his mining capital invested in the mines, and the houses are just as useful for working the mines as pumps and furnaces with which the water is removed or the ore roasted. And among the hills of British Columbia the first thing a miner does (when he intends continuous working) is to secure, or build if necessary, a cabin in a spot convenient as possible to his claim. It is not necessary that it should be actually on his ground. There may be overwhelming advantages in wood and water a quarter of a mile off. It is quite sufficient if it be in a place manifestly convenient for the workers. The building of a cabin on first settling down to the serious working of a mineral claim is therefore just as much miner's work in reference to the holding and working the claim as is, afterwards, the sinking of a shaft or the driving a tunnel, or building a pump."

That case was decided on the following sections of the Act of 1882:

"48. Every free miner shall, during the continuance of his certificate, have the exclusive right of entry upon his own claim, for the miner-like working thereof, and the construction of a residence thereon, and shall be entitled exclusively to all the proceeds realized therefrom; provided, that his claim be duly registered, and faithfully and not colorably worked; but he shall have no surface rights therein. Provided also, that the gold commissioner may, upon application made to him, allow adjacent claimholders such right of entry thereon as may be absolutely necessary for the working of their claims, and upon such terms as may to him seem reasonable.

"51. A claim shall be deemed to be abandoned and open to the occupation of any free miner when the same shall have remained unworked on working days by the registered holder thereof for the space of seventy-two hours, unless sickness or other reasonable cause be shown.

"52. Every full sized claim or full interest as defined in this Act shall be represented and bona fide worked by the owner thereof, or by some person on his behalf."

Second. It is submitted that because the plaintiff had already located a claim covering the same ground, on December 1st, he could not relocate it subsequently (on December 3d), without complying with section 7 of the Placer Mining Act Amendment, Act 1901, i. e., in this case he should have posted formal notice of abandonment on the four corner posts of his claim because it had not yet been recorded. What happened is peculiar. The plaintiff essayed to make a valid location of a "creek claim" under the repealed section 20 of the statute of 1897, which gave him a claim of 100 feet square. What he did amounted to making a valid location under that Act, but when he came to record the location he found out from the mining recorder that the law had been changed and that by the Act of 1901, then in force, he was entitled to a claim of 250 feet square which could only be obtained by conforming to the formalities of that statute which differed from the former, under which he had made his location. He thereupon decided to proceed no further with his abortive attempt under the former statute, and proceeded to locate under the existing one. In such circumstances I am of the opinion that he did right in treating the result of his former misconceived efforts as a nullity, and consequently it was unnecessary to comply with said section 7. There was no bar to his doing so, because no valid claim had been located by him on that creek, and therefore he was justified in beginning *de novo* to locate one. Though it does not, in this view, strictly affect the question, yet I also point out that said section 7 provides that after observance of its conditions the locator "shall thereupon be entitled to locate and record another placer claim upon other ground in

lieu of the abandoned claim," etc. It would, I think, be found difficult to apply such language to the exceptional facts of this case because it was the same ground that was relocated by the same locator.

Third. It is urged that the relocated claim is invalidated because in placing a necessary post on and about the centre of the common boundary line between the Owl and the Eagle claims, which line was exactly coterminous in each claim, one post was used to do duty for both claims. On one side of the post was written the name of the Owl claim, and on the other that of the Eagle. It is contended that the act requires the erection of a complete and distinct set of posts for each claim, and that no post can perform a joint duty. Before adopting such a very technical construction such an intention of the legislature must clearly appear, but I can find nothing in the act which positively requires it. What was done was at once convenient and plain and the notice on the post showed the two claims it pertained to, so that the object of the act in requiring due marking of the boundary had been accomplished.

Finally, the claim is sought to be invalidated on the ground that it was not continuously worked, or worked at all, for many weeks while the owners were working on the rock cut (drain) on the Hawk claim, just below the Owl, on the same creek. It is clear from the evidence that it was necessary for the miner-like working of the Owl that a rock cut and drain should be constructed through the Hawk. That work was consequently undertaken by the Owl's owners on a grub stake agreement with the owner of the Hawk, and the plaintiff relies upon section 49 of the Placer Act which provides that:

"A tunnel or drain shall be considered as part of the placer claim, or mine held as real estate, for which the same was constructed."

There was no necessity for the plaintiff to resort to section 48 and obtain and record the license of the gold commissioner, for that section was passed to protect the rights of other owners and the crown, while here the plaintiff had obtained the leave and licence of the party concerned. If a drain is to be considered a part of the placer claim, then the miner-like and necessary work done on it applies to and must be held to be a representation of the claim. There is nothing new in the idea that certain work done off a claim and in connection with it must be so regarded, because in Woodbury v. Hudnut, *supra,* the cabin was not built on the claim in question. The principle was sought to be distinguished because here the plaintiff was also working the Hawk under the agreement as well as making the drain. But surely because the owners concerned took advantage of the occasion to work that part of the Hawk through which the rock cut and drain were constructed, and so save the gold therein, the plaintiff had not lost his statutory right to have such drain regarded as part of his claim? Of course if I were

satisfied that this was merely a colorable scheme to work the Hawk and let the Owl lie idle that would be a very different matter.

It follows that the plaintiff's location, being a valid one, had been trespassed upon by the defendant, and for that trespass damages must be awarded, but only nominal, i. e., $1, according to Woodbury v. Hudnut, as there is no evidence of special damage shown, and there will be a perpetual injunction restraining future trespass, as prayed.

GROBE v. DOYLE.

[Supreme Court of British Columbia, February 17, 1906.]

12 Brit. Col. 191.

Mines—Net Proceeds of Ore—Contracts.

Under a contract for the sale of mining property providing that in case any ore is shipped from the property during a certain period the net proceeds shall be deposited to the credit of the vendors and applied in part payment, the term "net proceeds" is to be taken to refer merely to ore shipped to a mill or smelter for conversion and the deductions to be made are the deductions which in the ordinary course of business would be made at the smelter, including freight and smelting charges.

Action tried before DUFF, J., at Nelson, on the 16th and 17th of February, 1906, to rescind an agreement whereby the defendant was given an option to purchase the Yankey Girl mine, and develop and work the same during the term of the option. The plaintiffs further claimed the proceeds of ore mined and shipped by the defendant in his operations under the option, and alleged a number of breaches by defendant of the agreement in question, among others, that the net proceeds of the ore mined had not been paid to their account as provided in the agreement. The defendant maintained that there were no net proceeds after deducting expenses of mining and marketing.

For plaintiffs—W. A. Macdonald, K. C., and S. S. Taylor, K. C.

For defendants—R. M. Macdonald, and R. W. Hannington.

DUFF, J. The agreement between Lovell, Grobe and Macleod on the one hand, and Doyle on the other, provides for the sale of certain

NOTE.

There is apparently no case in which a contract of the same terms as that involved in the principal case has been considered by the courts of the United States. As valuable for purposes of comparison, however, the following cases are cited:

In Vietti v. Nesbet (1895), 22 Nev. 390, 41 Pac. 151, 18 Mor. Min. Rep. 247, a contract or agreement had been entered into by all the parties in interest whereby defendants were to haul ore produced at the mine which was being operated by plaintiff to their mill and there reduce it to bullion, they to account for 85 per cent of the assay value of the ore. Of the proceeds, the defendants were first to be allowed $25 per ton for hauling and working the ore and then plaintiff was to be paid the expense of extracting it from the mine. Under the terms of this agreement it was held that both the expense

mineral claims therein mentioned to Doyle, the defendant, in consideration of certain payments to be made on dates specified. In the meantime, according to the terms of agreement, the defendant became entitled to be put in possession of the mineral claims, and acquired the right to develop and work them subject to certain conditions as to the number of men to be employed and the manner in which the development work was to be done. The agreement also provides that "if any ore is shipped from the property the net proceeds are to be deposited to the credit of the vendors at the Canadian Bank of Commerce, and to be applied in part payment to the vendors." The agreement also contains a clause which may be described as a forfeiture clause, conferring upon the plaintiffs the right to cancel the agreement in case of breach by the defendant of any of its stipulations. The plaintiffs claim that the defendant broke or committed a breach of the terms of the agreement and so brought the forfeiture clause into play at various times during the months of June and July following its execution. The breaches complained of, are that the defendant in prosecuting development work and extracting ore from the mineral claims violated the terms of the agreement in respect of the manner in which the work was to be done; that the defendant failed to keep employed the number of men that the agreement provided he should keep employed for the purpose of prosecuting development work during the life of the agreement; that clause 7, relating to the disposition of the proceeds of ore shipped from the property, has been violated in that the net proceeds of a large quantity of ore shipped from the property have not been paid in accordance with the terms of that clause.

It is not in my judgment necessary that I should decide upon the questions which arise respecting the manner in which the defendant worked the mineral claims, or respecting the allegation that he failed to employ on development work the number of men required by the agreement. I have come to the conclusion that the defendant committed a breach of clause 7, and that is sufficient to dispose of the case. It is not disputed that a large quantity of ore was shipped from the properties

of milling and mining the ore would reduce the net proceeds which would in the end go to the several parties.

In Silver Valley Min. Co. v. North Carolina Smelting Co. (1898), 122 N. C. 542, 29 S. E. 940, 19 Mor. Min. Rep. 339, under a smelting contract by which the smelting company was to do the work of smelting ore for ten dollars for each and every ton of ore so worked and smelted for working charges therefor and pay to the mining company 95 per cent. of the silver contents of the product of the ore after deducting therefrom the smelting charges of ten dollars per ton, it was held that the construction of the contract was one of law and should not have been submitted to the jury. The court says "the words 95 per cent. of the silver contents of the product of said ore" mean 95 per cent. of the ore reduced to its smelted condition, it cannot mean 95 per cent. of the silver contents of the mass of ore as it was dug

which are the subject of this agreement to the Hall Mines and Granby smelters, and that the proceeds of the smelting of these ores were received by the defendant and that these proceeds have not been deposited in accordance with the terms of that clause. It is contended on behalf of the defendant that the phrase "net proceeds" as used in that clause means a sum to be arrived at after deducting from the gross proceeds the cost of smelting, the cost of delivery at the smelter, and the cost of mining; and it is not disputed that on that construction there is nothing which can be described as net proceeds. That is construction which in my judgment cannot be sustained. The plaintiffs offered evidence to show that in mining transactions this phrase has a fixed meaning, and it was sought to place a construction upon it by reason of usage among people engaged in mining transactions. I held at the beginning of the trial that I could not properly consider evidence of that character because of the fact that the contention was not properly raised in the pleadings. It may be conceded that the phrase "net proceeds" as it stands is open to more than one necessarily exclusive interpretation. The meaning to be attributed to the phrase depends in my opinion upon what is to be regarded as the subject of the transaction which is dealt with in that clause. Mr. R. M. Macdonald contends that the transaction is a transaction which begins with the taking of the ore from the mine. The plaintiffs on the other hand contend that the transaction to which it relates is a transaction which begins with the shipment of the ore on the railway. In the one case of course, if Mr. Macdonald's contention were correct, the net proceeds would be arrived at by deducting the cost of mining as well as the other elements to which I have referred; in the other case it is of course obvious that the phrase imports the deduction of the cost of transportation and smelting only.

Where in a written instrument you have language which is capable of more than one exclusive interpretation it is always desirable, for the purpose of ascertaining which of the different possible interpretations most probably agrees with the intention of the parties, to look at the

from the earth and before it was subjected to the smelting process. The defendants clearly did not contract nor did they intend to contract upon an assay made of the ore containing the silver metal before it was smelted, but they contracted upon the basis of the product resulting from the smelting process."

In Toombs v. Consolidated Poe Min. Co., 15 Nev. 444, 3 Mor. Min. Rep. 210, in settlement for extra work done by plaintiff in the building of a quartz mill for defendant and in consideration of a conveyance by plaintiff to defendant of his interest in the mill, defendant agreed to pay plaintiff a certain sum out of the first net proceeds of crushing and reducing ores to gold and silver in said mill. It was admitted that there had been no proceeds and in determining this fact the court evidently took into consideration the entire expenses of mining as well as of reduction.

circumstances surrounding the execution of the instrument. I do not of course mean that you are to consider discussions which preceded the execution of the instrument, or negotiations, as affording direct evidence of such intention; but you are to look at the situation of the parties, the nature of the subject-matter, the course of dealing between the parties, and the general course of dealing in the business to which the transaction relates so far as known to the parties at the time, together with the language of the instrument for the purpose of ascertaining what the parties had in view as the object of the transaction and what provisions they would most likely agree to for the purpose of reaching that object.

The plaintiffs were the owners of this property. They lived in Kootenay. The defendant came from Chicago, having, so far as the evidence shows, no interests of any kind whatever in this country. The plaintiffs, through lack of means, were unable to proceed with the development of their property and their policy, upon which they were all in agreement, was that they should attempt to sell; and these facts were perfectly well known to the defendant. The plaintiffs entered into the transaction with a view of selling the property to the defendant, or, failing that, the procuring of such development of the property as would exhibit its character to possible future purchasers.

The agreement was entered into on the 13th of March, 1905. The first payment the agreement provides for was to be made on the 15th of September, 1905. The defendant acquired the right of immediate possession and the right to proceed immediately to work and ship ore from the property. The defendant entered into no obligation to work or develop the property. The obligations which he entered into were purely conditional; in the event of ore being shipped, then the proceeds were to be paid as I have mentioned; in the event of work being done, in so far as development work at any rate was concerned, it was subject to certain conditions, and the obligation to observe these conditions was the only obligation into which he entered. Mr. Macdonald contends that in these circumstances we must take it from the language of the agreement read as a whole that the arrangement at which the parties arrived was this: the defendant acquired the right to extract ore from the property; that the ore when extracted became the property of the defendant subject only to this, with respect to any ore which should be shipped to a smelter the net proceeds should be deposited in the bank according to clause 7; that in ascertaining the net proceeds the defendant should be entitled to deduct the cost of mining as well as the cost of conversion of the ore, and further, that this privilege of extracting ore and shipping it from the property subject to this condition came into effect immediately upon the execution of the instrument six months before the date when by the

terms of the agreement the defendant would be called upon to make up his mind whether he should act upon his option of purchase by making the first payment, or abandon it. It seems to me that it is a most unlikely thing that an agreement of that character would have been entered into by these parties in the circumstances. There is, as I have pointed out, nothing in the agreement which obligates the defendant to deal in any particular manner with the ore extracted from the mine. If it be true that the agreement conferred upon the defendant the right of property in the ore subject only to his liability to account for the net proceeds in case of there being any, then the plaintiffs placed themselves in such a position that they had absolutely no protection, no kind of security whatever (except the bare personal covenant of the defendant) that the provisions of clause 7 would be observed. Is it to be supposed that these plaintiffs deliberately placed this defendant in a position in which, during the six months preceding the date fixed for the first payment, he would have absolutely untrammelled control over the disposition of ore extracted by him from the properties during that period subject only to his liability to account for these proceeds? It is perfectly obvious that if the construction contended for be the true construction, the defendant acquired under the agreement the right to hold the ore extracted until after the lapse of his rights under the agreement and then proceed with the conversion of it. In such case it is not easy to see what would be the plaintiffs' remedy if the defendant should be minded to act dishonestly. Having regard to the situation of the parties I cannot believe that the plaintiffs deliberately placed themselves in such a position. It is strongly contended by Mr. R. M. Macdonald that the language employed in this part of the agreement conferring upon the defendant the right to work the property imports in its natural meaning the right to appropriate to his personal benefit, and as his property, the ore extracted from the property. In my opinion that is not the necessary meaning of the language employed, and reading that part of the agreement with clause 7, and in the light of the circumstances, I have come to the conclusion that that is not its meaning. The true view is, I think, this: the defendant's rights in respect of the ore extracted from the property were limited to the right to ship the ore for the purpose of conversion, and were subject to the condition that the proceeds of such conversion should be applied in accordance with the terms contained in clause 7. Pending the payment of the purchase price provided for in the agreement the defendant in my opinion acquired no right of property in the ore *in situ* and none after extraction from the mine.

The operation of developing the property was, pending the payment of the purchase price, to be done by the defendant for the owners of the property, and in shipping or dealing with the ore he was to deal with it

as a trustee for the plaintiffs, and the proceeds in his hands would be in his hands as such trustee. If this view be correct very little difficulty meets us respecting the construction of the phrase "net proceeds." That the plaintiffs should agree that their property, through the mere process of conversion into cash, should as to the greater part of the proceeds become the property of the defendant, is altogether too violent a supposition.

Apart altogether from these considerations there are considerations arising out of the language of clause 7 itself which appear to me to be conclusive. I have no doubt that the clause was adopted for the protection of the plaintiffs, not, as Mr. Macdonald strongly argues, merely as a regulation to serve the convenience of both parties to the contract. I apprehend that there can be no doubt that as a measure of protection such a clause would be quite useless unless the sums required to be deposited should be sums readily capable of ascertainment. Now if the sums were to be ascertained in the manner contended for by Mr. Macdonald, not only are they not readily capable of ascertainment, but the plaintiffs would be in such case entirely at the mercy of the defendant as to whether they should be ascertained at all except by means of legal proceedings. There is nothing in the agreement requiring the defendant to keep any accounts by which the cost of mining particular shipments of ore could be determined; there is nothing requiring him to submit his books for the inspection of the plaintiffs nor to supply the plaintiff with any information whatever which would enable them in any particular case to arrive at the extent of preliminary ascertainment of this cost; it is obvious that as a protection to the plaintiffs it is quite useless. Now when we look at the structure of the clause itself we find that what it deals with is "ore shipped," or rather the net proceeds of ore shipped, not the net proceeds of the working of the properties, nor the net proceeds of ore mined from the properties, but the net proceeds of ore shipped. Moreover the clause obviously refers only to ore shipped for conversion, that is, ore shipped from the property to a mill or smelter for conversion. The language is, I apprehend, quite clearly open to this construction, namely, that the transaction dealt with by the clause is the conversion of the ore at the place of conversion; and that the deductions which the parties had in mind are the deductions which in the ordinary course of business would be made at the smelter; these deductions, according to the evidence, including freight and smelting charges. All the considerations which I have mentioned lead me to the conclusion that this is the construction which should be adopted. The view I suggested during the course of the argument, namely, that the deductions should include the cost of transportation from the mine to the railway, is open

to some of the objections to the construction contended for by Mr. Macdonald; in that case the sum required to be deposited would not be a fixed and ascertained sum, and moreover would not be capable of ascertainment except by means of an account based upon information in the possession of the defendant, which, under the terms of the agreement, the defendant is not bound to give to the plaintiffs, and the accuracy of which the plaintiffs would have no means of testing if given.

There remains the question of waiver. The evidence of the plaintiff Grobe satisfies me that nothing has occurred which would justify me in coming to the conclusion that the right to cancel the agreement in consequence of the breaches which are complained of and which have been proved did occur. And with regard to the plaintiff Graham, about whose rights I had some doubt in respect to the question as to whether or not he had waived his rights of cancellation, Mr. Taylor has satisfied me that in the circumstances of this case the payments made on the 1st of June and the 1st of July have not the effect which Mr. Macdonald contends. It remains only to refer to the fact that the shipping clause in the agreement between Graham and the defendant is slightly different in its phraseology from that in the agreement to which I have just referred. The change in the language, however, is not substantial, and all the observations which I have made regarding the other agreement apply to Graham's agreement. The plaintiffs are entitled to a declaration that the defendant's rights under the agreement have been forfeited, and to an order directing the payment of the moneys in question in the action in accordance with their respective interests.

ATTORNEY-GENERAL v. DOMINION COAL CO.

[Supreme Court of Nova Scotia, 1910.]

44 Nova Scotia 423.

Mines—Coal Leases—Nova Scotia—Powers of Mining Commissioners.

Where by Act of Legislature (Act of 1908, c. 11) the power was withdrawn from the commissioner of mines to receive applications for leases of areas situated within a specified territory, and, in view of confusion and difficulties which had arisen with respect to the boundaries of leases within said territory, a survey was ordered, the court declined to make a declaration that there was vacant in the territory specified not covered by existing leases and open to application by the relator, or that defendant's lease exceeded the statutory limit.

Per Meagher, J. (Townshend, C. J., concurring). Where a discretion is given to the court it will not be exercised where the result would be embarrassing.

Per Russell, J. (in the judgment appealed from). A statutory power in respect to leases of crown lands must be strictly exercised.

This was an action brought by the Attorney-General of Nova Scotia on the relation of J. Sydney Burchell against the defendant company to vacate a certain lease of coal granted to defendant by the Province of Nova Scotia, or in the alternative for a declaration that the relator was entitled to have issued to him certain coal mining leases applied for by him on April 2d, 1907, and an injunction and other relief, etc.

The facts are set out at length in the judgments.

The cause now comes up on appeal from the following judgment of RUSSELL, J.:

The relator is claiming that a lease, No. 430, issued to the defendant company, is void, because it contains more than one square mile, and because the Crown was misled by the representations that the area applied for and so granted contained only one square mile.

NOTE.

Powers of Commissioner as to Licenses and Leases.

The commissioner of mines has only the powers conferred on him by statute and has no jurisdiction to enforce equities entirely outside of the statutory proceedings. In re McColl, 22 Nova Scotia 17; Mott v. Lockhart, 8 A. C. 568.

The powers of the commissioner with respect to prospecting licenses are simply to decide whether he will grant the license or not. In re Malaga Barrens, 21 Nova Scotia 391.

Upon application for lands already under lease the commissioner has no power to cancel the former leases as irregularly or improperly issued. In re McColl, 22 Nova Scotia 17.

It would seem that after the commissioner of mines has granted prosecuting licenses he cannot, upon subsequent

The defendant company claims that the area contains only or less than a square mile, and that even if it should be found to contain more, the only consequence would be that a larger rental should be paid as provided by chapter 18, section 211, sub-section 2. I do not so read the sub-section referred to. Section 190 provides that the commissioner may issue a lease covering one square mile, but that if, on investigation, it is shown that such an area is not sufficient to make a profitable mine the Governor-in-Council may authorize the issue of a lease covering a larger tract. The purpose of section 211 was, I think, merely to provide that, in such a case, the lessee should pay an additional rental for the additional area, that is to provide for the case of an area properly granted of larger size than one square mile and not for the case of such area granted without the requisite authorization by the Governor-in-Council. The provision is not "if the land is granted without the authority of the Governor-in-Council," but "if the land covered by the lease exceeds the tract or ground which such lease under the provisions of this chapter *may* without the authority of the Governor-in-Council cover," that is to say, if the land exceeds one square mile and an order in council has been made authorizing the enlarged area. The reading contended for by the defendant would dispense altogether with the necessity of any authorization by the Governor-in-Council.

Whether the lease, if containing more than one square mile, is void altogether, or void only for the excess, is a more difficult question. In The Queen v. Hughes, L. R., 1 P. C., Lord Chelmsford says: "In the present case a statutory power is given to the governor to be exercised over the Crown lands. This power must be strictly pursued. The leases which he is authorized to make are limited to the extent of eighty acres. This quantity is said to be exceeded in the leases in question; if so, they are altogether void." Defendant's counsel says that this is merely an assumption of Lord Chelmsford for the purposes of the appeal. It may be so as to the fact that the leases contained more than eighty acres, but it is certainly the expression of a judicial opinion that if they

applications for licenses involving the same areas, hold an investigation and determine the regularity of the original license. In re Malaga Barrens, 21 Nova Scotia 391.

The fact that an application for a license to search conflicts with a previous application will not invalidate either the application or the subsequent lease if at the time of the granting of the lease the first application has expired without having been acted upon. Fielding v. Mott, 18 Nova Scotia 339.

The commissioner may be compelled by mandamus to decide on an application for a lease. Drysdale v. Dominion Coal Co., 34 Can. Sup. Ct. 326.

In Nova Scotia prior to the Act of April 30, 1892, the commissioner had no authority to accept any application for an area while a previous application is subsisting. Under the statute men-

did so they were void. In the present case I do not see how, if the lease contains more than a square mile, I can determine for which part it is good and at what part I am to locate the excess as to which it is void. If it is for more than one square mile, it would seem from the observations of Lord Chelmsford in the case referred to that I should have to declare it void. There are analogous cases in our own court or cases possessing more or less similar features to this, which have been cited on both sides of the question. They are cited in briefs that have been supplied to me, and the authority of the late Judges, Ritchie, E. J., and Ritchie, J., seem to favor the view that the lease is void, while that of the late Sir John Thompson seems to bear the other way. The result is such at all events as to compel me to enter upon the inquiry whether the lease in question does or does not contain more than a square mile.

But it is necessary first to deal with a contention that the lease describes nothing at all; that at the end of the second course the description merely returns upon itself and describes two lines enclosing no space. This results from an adherence to the letter of the description which is as follows:

"Beginning at an iron post on the shore of Cape Breton Island at high water mark near the entrance to Little Bras d'Or, said post being the south-western angle of an area this day applied for as a substitute for the southern portion of a former lease, No. 41, Renewal No. 51; thence north sixty-eight degrees east by the southern boundary of aforesaid lease, and a continuation thereof, to the south-eastern corner of Lease No. 110, now held by the Dominion Coal Company, Limited; thence southerly to the north-east corner of an area this day applied for as a substitute for former lease No. 58, Renewal No. 64, held by the Dominion Coal Company, Limited; thence westerly following by the northern boundary of said lease No. 64-58 to high water mark on the shore aforesaid; thence northerly following by the windings of the shore at high water mark to the place of beginning."

tioned, however, the commissioner is left free to receive all applications which are made in due form for the same area. McColl v. Ross, 28 Nova Scotia 1.

It is not necessary that a district shall have been proclaimed in order that a lease may be granted under the Nova Scotia statute, Rev. St. 4th series, c. 9. Mott v. Lockhart, 8 App. Cas. P. C. 568; Fielding v. Mott, 18 Nova Scotia 339.

The fact that territory has been proclaimed a gold district does not invalidate applications in due form made in accordance with the statute governing land which has been proclaimed. Before applications are required to be in the form required for gold districts, it is necessary that areas shall have been laid off in a particular way and of a particular size, and a plan prepared with the areas as laid off distinctly marked thereon. Attorney General v. MacDonald, 8 Nova Scotia 125.

It is said that lease No. 64-58 is bounded northerly on the leases colored yellow, blue and something between pink and yellow, which I am told is salmon color, on the plan used by me at the trial. This is true of the original lease 64-58, and reading the description as if it referred to this original lease it encloses nothing. But there was a lease issued as a substitute for the former lease 58, renewal No. 64, as shown by this very description, and if the words "said lease" in the description are read "said substituted lease" the difficulty vanishes. The southern boundary of lease 430 is the northern boundary of the area colored pink in the plan used at the trial. To locate the northern boundary is a much more difficult task. It is the southwest angle of an area applied for as a substitute for the southern portion of a former lease 41, renewal 51, that is the lease colored yellow on the plan used at the trial. That is to say, the iron post from which the description starts is said to be the south-western angle of such area, and of course there is a question which it is not very easy to answer, whether the iron post being a visible monument is to be taken as the starting point, or whether it is possibly a mere *falsa demonstratio,* a point selected because it is assumed to be the southwestern angle of the substituted lease so that the angle aforesaid, if it does not correspond with the iron post must, nevertheless, be taken as the true starting point. I understood the plaintiff's contention to be that the starting point was the point "F" on the plan, but even if the iron post which is at the point "G" on the plan were taken as the beginning of the description, the lease would be found to contain more than a square mile. Whether it does or does not contain this excessive quantity depends upon the way in which the leases north and south of the area in question are located, and the evidence touching this matter is of extreme intricacy. It would serve no useful purpose to analyse it or to explain it at length. The fact is that there are so many ways in which it may happen that the correct application of the description to the ground will produce an area less than one square mile, that it is impossible, I think, for the plaintiff to make out a demonstration of the contrary such as his case calls for.

I have said that the iron post is assumed to mark the southwestern angle of a lease applied for in substitution for a portion of a former lease. This last mentioned lease is the one colored yellow on the plan and numbered thereon 12-51-41. Its third course, which is south 6 degrees east 111 chains, is supposed to come to a point east of Little Bras d'Or. The course and distance so described do not, as the plaintiff plats them, come anywhere near Little Bras d'Or. On the contrary when the fourth course is drawn of ninety chains parallel to the shore, still in a southerly direction, if drawn in such a way as simply to reproduce the

line of the shore a distance of ten miles therefrom, as I understand plaintiffs to contend that it should be, it still fails to reach Little Bras d'Or, and even if this course is drawn in a straight line ninety chains long, instead of following "the sinuosities of the coast," it does not go as far as the preceding course was supposed to carry by those who drew the plan attached to the original lease.

The descriptions in the substituted leases are almost as great a puzzle. For the southern portion of the lease an area is substituted beginning near the extreme end of Point Aconi as shown by an iron post marking the southeast corner of the lease on the same day applied for as a substitute for the northern portion of the former lease, thence southerly in continuation of the eastern boundary or the aforesaid substituted area on a course south six degrees east, crossing Point Aconi. The continuation of the eastern boundary of the said substituted area would not go anywhere near the course south six degrees east. It would run inland. It is described as going sixty-two chains, more or less, to a point distant twelve chains from an iron post set at high water mark on the shore, measured therefrom in a course bearing north sixty-eight degrees east, said point being fixed to correspond with the southeast corner of area formerly leased under No. 51-41, as shown on the plans in the office of the Commissioner of Mines at Halifax. This iron post is the same already referred to as the starting point of lease No. 430, and if it does actually mark the southwest corner of the former lease 12-51-41, there does not seem to be much difficulty in the case. Lease 430, the one in question, is described as running from this iron post sixty-eight degrees east by the southern boundary of the substituted lease. This substituted lease has a southern boundary identical with that of the original lease, and the two leases to the east of it have their southern boundaries in the line. The area which the description covers would therefore properly be represented on the plan by the letters "G," "H," "I," "J," and Mr. McKenzie, the plaintiff's surveyor, says that this figure encloses a space somewhat less than one square mile.

The plaintiff is seeking to establish a southern boundary for the areas colored yellow, blue and salmon color, running from a point north of the mouth of Little Bras d'Or. This is in plain contradiction of some of the essential terms of the descriptions. The description of lease No. 41, the original lease of the area colored yellow on the plan used at the trial, requires, as already stated, that the third course should carry to a point ten chains east of the shore between the mouth of the Little Bras d'Or and Big Pond. That is clearly to a point south of the entrance of Little Bras d'Or. It may well be that 111 chains, the fixed length of the course, will not carry to that point, and it may be impossible to define

the precise point to which it will carry, or the precise point to which this course, if the distance be ignored, should be held to carry. But if it goes anywhere near Little Bras d'Or the addition of the ninety chains required for the fourth course will carry far to the south of the point "F" which plaintiffs have indicated on their plan as the southern boundary of the lease. The substituted lease, No. 427, the southwest angle of which is the starting point of lease No. 430, is described as having a southern boundary identical with that of the original lease 41. That is, the southeast corner is the same, and the course being the same the southwest corner must of necessity be also identical. The other leases to the east are all "tied in" to the lease No. 41, and while it may be difficult, and to me is impossible, to say where the southern boundary of these leases should be drawn, the plaintiff has not proved, and I think cannot prove, that they are not far enough to the southward to reduce the area between those boundaries and the figure colored pink on the plan to less than one square mile. If this be so, it is not necessary to deal with the evidence as to the leases on the other side of the area in question, as to which the evidence is that they may be so plotted as to push the northern boundary of the lease colored pink six chains further north than it is drawn on the plan, which would in itself reduce the area of No. 430 below one square mile. I do not say whether this manner of plotting them is correct or not, nor do I find it necessary to determine that question, because I am satisfied from what has been said with reference to the areas on the north of the area in question, that the plaintiffs have not proved that No. 430 exceeds the statutory limit.

As to the contention that there is vacant space, and that the plaintiffs are entitled to a declaration to that effect, I incline to the view that I cannot enter upon that inquiry. It was a matter for the Commissioner of Works and Mines and could only come before this court on appeal from his refusal to grant a lease. But if this is not the correct view of the law I think also that the true northern boundary of the defendant company's lease No. 430 is the southern boundary of the three leases colored yellow, blue and salmon color on the plan, and that there is no vacant space for which a lease could have been made to the relator.

The relator is, I think, entitled to have the defendant's leases Nos. 429 and 430 declared to be subject to the clause 191 (a) of the chapter as amended by chapter 32 of the Acts of 1907, § 2.

1909, January 18th. H. Mellish, K. C., W. B. A. Ritchie, K. C., and C. J. Burchell, in support of appeal.

H. A. Lovett, K. C., and L. A. Lovett, contra.

1909, November 27th. TOWNSHEND, C. J. On the argument of this appeal several questions of importance were discussed, but in view of

chapter 11, Acts of 1908, it seems to me unnecessary to express the conclusions at which I have arrived. By that act it is provided that: "Notwithstanding any of the provisions of the Mines Act or any amendment thereto, the Commissioner of Public Works and Mines shall refuse any application for a coal mining lease, or license to search of or over any submarine area or tract of ground comprised within the territory" * * * (describing the locus in question) * * * "and shall refuse to grant a lease of any area or tract of ground comprised within said territory, notwithstanding any application for lease thereof heretobefore made, or any existing license to search."

Section 2 further provides that:

"The Commissioner of Public Works and Mines shall cause to be made all surveys, investigations and inquiries necessary to determine the location and boundaries of any or all leases heretofore issued of areas or tracts of ground comprised within the territory mentioned in the next preceding section."

The purpose of this suit is to have a declaration made by the Court that there is vacant land in such territory available for leasing.

Apart altogether from the question of the right of the Attorney-General to bring this action, and apart from the question of the want of jurisdiction in this court to determine disputes left by the legislature as contended, to the Commissioner of Public Works and Mines only, and apart from the question whether there is vacant land in the territory, it seems to me both inexpedient and useless to make such a declaration. The Legislature has, by special act, withdrawn from the commissioner the power to receive any application for areas within this territory, or to grant any licenses or leases. Further, in view of the confusion and difficulties which have arisen in connection with the boundaries and titles of the present leases, and to prevent further confusion, in addition to forbidding any licenses or leases, the Legislature has directed the commissioner to have the whole territory surveyed and examined, no doubt with a view of rectifying, as far as possible, the errors which have led to all this trouble.

For this reason alone, without expressing any opinion on the other points, I think it inadvisable and inexpedient, under the circumstances, to make the declaration asked for, and I am of opinion the appeal should be dismissed.

At the argument it was suggested that the Royal Trust Company should be added as defendants, and on application this was subsequently done. That company appeared and pleaded, and relies on the same defenses as the Dominion Coal Company. Counsel agreed that the same

evidence should be used, and that no more should be taken and that no further argument was desired.

I concur also generally in the opinion of MEAGHER, J.

GRAHAM, E. J. By the Mines Act, Revised Statutes of Nova Scotia, c. 18, § 191, it is provided that:

"A lease may cover (a) for the purpose of coal or iron, a tract of ground not exceeding one square mile, and not exceeding two miles in length."

Then sub-section 2 provides that a lease for a larger area, after an investigation and under special circumstances and when authorized by the Governor-in-Council and imposing conditions, may be issued by the Commissioner of Mines, but not exceeding double the extent or double the length already mentioned, except in a case not necessary to consider.

When in 1869 lease 12-51-41 was obtained by Ross & Moore and ultimately renewed to the defendant on August 25, 1906, the statute was practically the same as now, except that the length (I refer to the ordinary lease) "should not exceed two and one-half miles." R. S., 3d Series, c. 25, §§ 92, 93, 97, 99.

The size of the area leased is important in view of the public revenue. The price fixed by the Act for the lease and the annual rental (sections 189 and 211) are so much for a square mile.

In my opinion a lease exceeding the area of one square mile is void as against the Crown, and subject to attack by the Crown on that ground. There are at least three utterances of the Privy Council to that effect. Rex v. Clark, 7 Moore, P. C., 77; Queen v. Hughes, L. R. 1 P. C., at page 92. "In the present case a statutory power," etc., and Williams v. Morgan, 13 A. C., 239. "The court below," etc. The substance of the statutory provision in that case is given by Lord Watson's judgment in Osborne v. Morgan, 13 A. C. 232, viz., "It is thereby made lawful for the Governor to grant to any person a lease of Crown Lands for mining purposes not exceeding twenty-five acres for any term not exceeding, etc." As to the Crown's remedy I also refer to p. 234, "it does not seem, etc."

The case of Fielding v. Mott, 18 N. S. R., 347, 14 S. C. R., 254, and Osborne v. Morgan, 13 A. C., 277, were cases where the Attorney-General was not a party. The Crown was not attacking the instrument and a private party was seeking to attack them collaterally by a proceeding against his rival. In Osborne v. Morgan, at page 234, Lord Watson said:

"It does not seem to admit of doubt that the Crown would have a good title to challenge the validity of these two leases upon the first ground advanced by the appellants either by means of a writ of intrusion

or by an information in chancery. * * * But the appellants assert their right to terminate the leases and to dispossess the lessees not only without the aid but against the wish of the Crown."

And he goes on to show the inconvenience of that being allowed to take place.

I refer also to the decision In re Ovens, 23 N. S. R. 376, and In re Wier, 31 N. S. R. 103, where Townshend, J., points out the distinction, citing Osborne v. Morgan.

It is true that Thompson, J., in the judgment in Fielding v. Mott, 18 N. S. R., 347, dealing with a similar point in the case of a gold lease, among several other points and without hearing counsel for the defendant, seemed to be of the opinion that such a provision was directory only. Now while the Supreme Court of Canada affirmed that judgment it cannot be inferred, although it is so stated in the reporter's note, that they supported that position only upon that ground. I think in Osborne v. Morgan, the real ground is shown. The weight of authority, I refer to the Privy Council decisions, is against the view that such a statutory provision would be directory merely.

In respect to section 211 (2) of the Mines Act, as affecting the contention just dealt with, I agree with the judge appealed from in the construction of that section and that it does not impliedly permit larger areas than one square mile. It is awkwardly expressed, but it is framed to avoid repeating the various sizes of areas permitted for the ordinary leases of the various minerals as mentioned in section 191 (1). It means "If the land covered by any lease exceeds the tract of ground which, under the provisions of this chapter, such lease may without the authority of the Governor-in-Council cover," that is one square mile in the case of coal or such other area for other minerals, referring to those special leases of greater areas provided for under section 191 (2), "the lessee shall" pay accordingly.

The point which I have endeavored to make assists, I think, the plaintiff's contention as to the construction of the description of the lease 12-51-41. It did not go as far south as defendants contend for, or it would have been void for excessive dimensions.

The locality of the southern boundary line of that lease is the turning point of the case, because its southern boundary line determines where the southern boundary line of the adjacent lease 13-52-42 immediately to the east, and of lease 110 next adjacent to the east of that, lies. It is all one continuous line. It is contended that to the southward of that group of leases the Crown has vacant space, and that the lease 430 claimed by defendant to adjoin these leases on their south, if it covers the space, also exceeds the statutory limit of one square mile.

I should have mentioned while referring to the locality of lease 12-51-41, that it was surrendered, and that the area was covered by fresh leases, 426 and 427. On the 17th December, 1906, it and two other leases along the shore, probably in anticipation of coming events, namely legislation to which I shall have to refer later, were surrendered and four fresh leases were taken in their places, namely leases 426, 427, 429 and 430. The area was held under application until May 5, 1907, when these leases were registered. The object, of course, was to rearrange the size of the leases in order to make all the leases fit the Procrustes bed of the statute, and no objection can be made to that. But while the precaution was taken in respect to the leases touching the shore, a precaution was not taken in respect to lease 13-52-42, and lease 110, just beyond (seaward) which, as I said, have a southern line no further to the south than the old lease 12-51-41 had, and to move these further south with it. For it is contended that the iron post which now indicates the southern boundary of lease 427 and the northern boundary of lease 430 is further to the south than the southern line of the old lease 12-51-41. And that leaves vacant land between leases 13-52-42 and 110 and lease 430, and if that lease 430 covers the space it has an excessive area.

Where was the southern boundary line of lease 12-51-41?

The description of the old lease 12-51-41 is as follows:

"Beginning on the shore of Boulardarie Island, near Table Rock, at the northern boundary line of John Stubbart's farm lot; thence north 20 degrees east (in 1885) 20 chains; thence north 68 degrees east 94 chains; thence south 6 degrees east 11 chains, to a point distant 10 chains east of the shore between the mouth of the Little Bras d'Or entrance and Big Pond; thence southerly parallel to the shore 90 chains; thence south 68 degrees west 12 chains to the shore; thence by the shore at high water mark northerly, westerly and easterly, crossing the mouth of the Little Bras d'Or entrance at the bar round Point Aconi to the place of beginning, containing one square mile,—in manner and form as in the said area is specified and delineated upon the plan hereto annexed."

Page 6, Book of Lease plans.

The plan attached to this lease marked exhibit M-86 is exhibit M-106. Table Rock is well known, and the intersection of the shore and the northern boundary line of John Stubbart's farm, are established beyond dispute in this case. It is at the 111 chains course that the difficulty begins. It is to end at a point 10 chains east of the shore between the mouth of Little Bras d'Or entrance and Big Pond. And the plan attached so shows it. The next course is to continue still southerly 90

chains, then in returning along the shore the line purports to cross the "mouth of the Little Bras d'Or entrance at the bar."

Unfortunately, the "mouth of the Little Bras d'Or entrance" and "the bar" are in fact about a mile further to the south than they are represented to be on this plan annexed to the lease. The distance between two points on the plan, Point Aconi and Alder Point, as scaled on the plan is 64 chains, while the actual distance between those two points is one hundred and forty chains.

The "111 chains" call, according to the description and the plan, takes one to the south of the latitude of the mouth of the Little Bras d'Or entrance, and he still must go southerly (parallel to the shore too) 90 chains, which would make the area a mile longer than the statute permits and greatly to exceed the statutory area of a square mile.

The defendants' theory is not, however, that. That is too obvious a *reductio ad absurdum*. They assent to the terminus of the "111 chains" being placed at a point by measurement on the ground very near to the place where the plaintiff puts it, very far short of the latitude of the mouth of the Little Bras d'Or, and there commence with the "90 chain" call. Thence by going in a straight direct line, not "parallel to the shore" and by going 94 chains instead of 90, they manage to cross the mouth of the Bras d'Or entrance (and reach the present iron post) at the sacrifice of everything else.

This theory rejects the delineation of the area upon the plan and would place the "natural monument," the mouth of the Bras d'Or entrance, at least 90 chains south of its locality as represented on the plan.

It is evident that something in this description must be rejected. Both sides admit that. But what? In my opinion the reference to the mouth of the Bras d'Or entrance and the Bar must be eliminated. This I know is rejecting what is usually called a natural monument in favor of dimensions and quantity, but I shall deal with the authorities presently.

The intention of the parties is an important element.

It is not contended that the Department of Mines or any of the officials of the Government ever, before the lease was issued, made an actual survey of this area embraced in lease 12-51-41. No one appears to have surveyed along the whole length of the shore. Mr. Hall, the clerk from the department, says, page 75:

"Q. You grant coal leases sometimes without a survey? A. Oh, yes, very often.

Q. That is the usual practice? A. Yes.

Q. Surveys are not made with regard to submarine areas ever? A. None that I ever knew, no.

Q. Have you any surveys on file in the Mines Office of any lease now held by the Dominion Coal Co. in that district? A. Not that I am aware of.

Q. You would know if they had? A. I would.

Q. Did the Mines Department ever place any monuments for locating leases? A. I could not say, not that I know of.

Q. You are familiar with the descriptions in those leases, 426, 427, 429 and 430? A. Yes, the first I knew of the monuments was when they were made reference to in the description.

Q. You haven't done anything to locate the correctness of these monuments? A. No.

Q. Or to ascertain that they were monuments? A. No."

See also page 81, line 30.

Mr. W. R. McKenzie, the crown land surveyor, says, in respect to the plan annexed to the lease in question, page 21:

Q. What do you say as to the plan attached to exhibit M-11 (12-51-41)? A. It shows the shore line very incorrectly, inaccurately. All the point is shown with scarcely any resemblance to the real shore line.

Q. Alder Point is the headland shown on plan M-78? A. Yes, the shore line from about three-quarters of a mile to the south of Point Aconi is shown with scarcely any resemblance to the real shore line. The whole shore line is inaccurate, but the balance northerly and westerly shows a greater degree of accuracy, although not correct. I should say that the portion of this plan M-11 showing Point Aconi and westerly from Point Aconi, has been made from a rough survey along the shore. The balance of the shore along Alder Point around south is merely a very rough and inaccurate sketch."

In the American cases which are frequently cited in such a dispute the greatest importance is attached to this feature, namely, the preliminary survey which takes place in respect to government grants. That is so with us too. Because when the court is struggling with repugnant calls in a grant it knows that the Deputy Crown Land Surveyor and probably the other party were over the ground locating the grant. And if in the grant a line purports to cross a river or to touch any other natural mounment, that of course is of the greatest importance. One knows that the surveyor was actually there. But in respect to these coal leases we have not that feature. The Crown's agents were not present. The applicant in a hurry is doing the best he can from memory, or from some no doubt imperfect map of the shore of the country.

I suppose that the words "mouth of the Little Bras d'Or" would not have been included in the description at all, but it was conjectured that the measurements might take the lessee that far and then if the expres-

sion "thence by the shore" was followed it would take him in along the shore of the Little Bras d'Or and out of the way, so a crossing had to be provided for.

Natural monuments are preferred to courses and distances by the courts because it is supposed that the parties made their instrument of grant in view of the premises and were more likely to have made a mistake in their courses and distances than in respect to a natural monument. But if no one was ever there, surveying the area, that rule with its reason fails. The American judges sometimes designate these as "random calls."

Then there has been no possession of this submarine area, except, of course, by the Crown.

Here, I think, it may be said that dimensions are of the essence of the instrument. The area must not, as I have already intimated, exceed 2½ miles in length and one square mile in extent, or the lease will be void. By crossing the waters I have mentioned both the dimensions and the contents will be exceeded. I think that the Attorney-General has not lost that argument merely because the defendant company has recently rearranged the leases to cover the area, and the practical difficulty of the dilemma has thus been obviated. Had that expedient not been resorted to, no one would be now urging the plaintiff's contention louder than the defendants.

There is another ground for the exception to the rule prevailing in connection with the mines. I shall have to refer to the official map in the mines office presently. The applicant comes in with a description beginning at someone's lease, then running (course) two and a half miles to a tree or a rock marked D, or other monument. The commissioner has no trees or rocks on his map, but he plots it out by scaling two and a half miles. The distance to the trees may be actually three miles (forbidden by statute) and the area over a square mile. Which ought to govern in such a case?

Coming to authorities in Cowen v. Trifitt (1899), 2 Ch. 311, Lindley, M. R., said:

"I must, however, protest against the way in which the doctrine was stated by the appellant's counsel, that the maxim *Falsa demonstratio non nocet* only applies where there is some incorrect description at the end of the sentence. That is whittling away the doctrine and making it ridiculous. It is a misapprehension. I do not know that the principle can be better put than it is in Jarman on Wills, 5th Ed., 749, where it is said the rule means that where the description is made up of more than one part, and one part is true but the other is false, then if the part which is true describe the subject with sufficient legal certainty the untrue part will be rejected and will not vitiate the devise."

In Mellor v. Walmesley (1905), 2 Ch. 164, there was a conveyance of land and the dimensions were stated in the conveyance and marked on a plan, and the land was stated to be, though it was not so on the plan nor according to the dimensions, "bounded on the west by the seashore." It was held that the latter words must be rejected.

Vaughan Williams, L. J., p. 174, said:

"I cannot, however, agree with the learned judge that the present case is one in which the undoubted rule that when you have in the words of the description a sufficiently certain definition of what is conveyed, inaccuracy of dimensions or of plans as delineated will not vitiate or affect that which is there sufficiently defined, applies, because the description itself is a description of a piece of land situate on the seashore of certain dimensions which are set forth. Those dimensions in my opinion are not an addition to something which has already been certainly described, but are part and parcel of the description itself. The words are not an inaccurate statement of a quality of that which has already been certainly described or defined, but are part or parcel of that description or definition. The dimensions in this case, to use the words appearing on page 247 of Sheppard's Touchstone, are an essential part of the description and not a cumulative description in a case in which there is in the first place a sufficient certainty and demonstration."

In 4 Eng. & Am. Ency. Law, 286, it is said:

"Courses and distances control incidental calls for monuments, except where there is a clear intention shown to make such calls locative; and they also control indefinite and conflicting calls for monuments. They govern where surrounding circumstances show them to be more reliable or where such is the intention of the parties, or where monuments are called for by conjecture and not by actually running out the lines upon the ground according to rule. Sometimes a fixed and visible monument is controlled by course and distance. The doctrine that monuments control courses and distances is never followed where to do so would lead to an absurdity or where they are inconsistent with the meaning of a deed and adhering to them would defeat the grant."

In Buffalo Ry. Co. v. Stigler, 61 N. Y. 348, the Court of Appeals of New York said:

"The reason of the rule is said to be that conveyances are supposed to be made with an actual view of the premises by the parties. Hence courses and distances must be varied to conform to actual or ascertained objects or fixed boundaries designated or referred to by them. But when it appears from the designation of quantity, or other elements of description that the courses and distances from a fixed and determined line were intended to control monuments then the latter should be disregarded.

The intention of the parties as evidenced by the deed is in all cases to determine the location of the premises granted by it."

In Tuxedo Park v. Sterling, 60 N. Y. App. Div. 352, it is said by the court:

"But as an exception to the above general rule, it has been held that where the courses and distances are right in themselves they will prevail against monuments so as to carry out the intent of the parties. Higinbotham v. Stoddard, 72 N. Y. 94; Townsend v. Hoyt, 51 N. Y. 656. Where the courses and distances are to form a fixed line or to enclose a fixed quantity they will control natural monuments."

The reporter's note to White v. Luning, 93 U. S. 514, is as follows:

"The rule that monuments, natural or artificial, rather than courses and distances, control in the construction of a conveyance of real estate, will not be enforced when the instrument would be thereby defeated, and when the rejection for a call for a monument would reconcile other parts of the description and leave enough to identify the land."

There is another subsidiary consideration. As I have intimated, the defendant company, in order to cross the waters mentioned in the description, has to go in a straight and direct line southwardly from the terminus of the 110 chains call, whereas the course in the description of the lease is "thence southerly parallel to the shore 90 chains." And it is said that the word "parallel" is inappropriate unless there is a straight line, and you must take the general course of the shore. For brevity I refer to a case. In Fratt v. Woodward, 32 Cal. 573, (91 Am. Dec. 573), a case where the words are "easterly parallel" to a river, the court said:

"In Hicks v. Coleman, (25 Cal. 143), the land was bounded on one side by the Consumnes River, of which the course was not straight but meandering; and the question was whether the line upon the opposite side and which the deed described as parallel to the river, was to be a straight line parallel with the general course of the river, or a line with the same windings or courses as the river. We said 'we think the plain construction of the call of the third line is that it is to run parallel with the river in all its meanderings and not parallel with its general course.' This is the obvious import of the term 'parallel with the Consumnes River.' No other line can be said to be parallel with the river. * * * There is no force in the argument of counsel for the appellants founded on mathematical definitions. By definition parallel lines are undoubtedly straight lines, but in common speech about boundaries or in a geographical sense the words, as we all know, are often used to represent lines which are not straight but which are the protographs of each other. The term is used for the want of a better and not because it in all respects

fits the use to which it is applied." (Then cases are cited.) "It is so used to avoid circumlocution, and while such use is not technically exact it is not obscure, and there is no difficulty in understanding what is meant. Nothing is more common than to speak of boundaries which are not straight as being parallel."

By reference to the plan annexed to this case it will be seen that this 90 chains call is not a straight but a parallel line.

It will also be seen on each of the plans attached to the leases of the defendant company of the same shore, and to the southward of this locality, namely, leases 54, 55, 56 and 57, which contain the expression "northerly parallel to the shore" that this line is a sinuous line corresponding to the opposite line along the shore.

For these reasons I think that the south boundary line of the leases 12—51—41 and 13—52—42 and 110 extended no further to the south than is shown on the plaintiff's plan M—78, used on the trial. And that leaves vacant space to the southward unless the space is covered by lease 430, which I shall deal with presently.

The defendants' counsel contends that the defendants' group of leases along the shore on the other side of the gap which I have just attempted to show exists, namely, leases 54, 55, 56 and 57, should all be pushed farther to the north, and that would enable leases 429 and 430 which bound on them, to fill up the gap. I am of the opinion that those leases are properly located on the plan used at the trial. They all depend on lease 54, and 54 bounds on the original lease to the General Mining Association, No. 27. I think that the point BB. on the plan 78, at that corner of lease 27, is established beyond controversy. Now it appears that in January, 1886, lease 27 of the General Mining Association was replaced by two new leases, and that notwithstanding lease 54, then held by Peter Ross, covered the area, the General Mining Association's substituted lease took up six chains further to the north, overlapping 54.

Then when 54 was renewed on August 25, 1886, by a renewal lease 60, it followed the old description bounding on the lease of the General Mining Association. And the defendants' counsel contends that this means the lease substituted for 27, which, as I said, is six chains further to the north. I do not agree with him. The lease substituted for lease 27 was simply void to the extent which it overlapped lease 54, then outstanding. That has frequently been held in this court in respect to these statutory instruments under this Act. It does not lie dormant, it is void.

The expression in lease 60, the renewal of lease 54 bounding it on the lease of the General Mining Association, means the lease of that Association, as it existed in law, founded on the foundation lease 27. And, therefore, lease 54—60 is not to be pushed six chains further to the north.

He further contends that all of this group of leases must be pushed further to the north, because the words in them to which I have already referred "northerly parallel to the shore" mean the general course of the shore not following its sinuosities. And by changing these to straight lines the leases will all be pushed further to the north. That course would upset the plans annexed to those leases which I said have sinuous lines corresponding to those opposite on the shore. Besides these leases would each exceed a square mile if this mode of measurement was adpoted. Mr. Risley, the engineer, says, page 54, line 20:

"Q. If 47 chains (the width) were drawn at right angles to the side lines of these leases, would the area therein contained be more than one square mile? A. It would."

I have already cited authority as to the meaning of the words "northerly parallel to the shore" which is against this contention.

This brings me to lease 430, which, it is contended by the defendant, fills the gap on the plan used at the trial, but not shown there because the plaintiff who uses the plan contends that it cannot be delineated. I have already referred to a surrender of leases along the shore and a readjustment to meet the requirements of the statute as to area. Leases 429 and 430 are substitutes for surrendered leases.

Lease 64 was surrendered because it contained more than a square mile. The adjoining lease 207, a small one, was surrendered at the same time. And instead of these leases 429 and 430 were taken and new descriptions were given to them. Lease 430 has part of 429 with 207.

This is the description of lease 430:

"Beginning at an iron post on the shore of Cape Breton Island at high water mark, near the entrance of Little Bras d'Or, said post being the southwestern angle of an area this day applied for as a substitute for the southern portion of a former lease No. 41, renewal No. 51, thence north sixty-eight degrees east by the southern boundary of aforesaid lease, and a continuation thereof to the southeastern corner of lease No. 110, now held by the Dominion Coal Company, Ltd., thence southerly to the northeast corner of an area this day applied for as a substitute for former lease No. 58, renewal No. 64, held by the Dominion Coal Co., Ltd.; thence westerly following by the northern boundary of said lease No. 64—58 to high water mark on the shore aforesaid; thence northerly following by the windings of the shore at high water mark to the place of beginning."

It begins at the iron post G. on the plan M—78, used at the trial, at the corner of lease 12—51—41, thence along the southern boundary of that lease "and a continuation thereof to the southeastern corner of lease No. 110."

In a former part of this opinion I have endeavored to establish the locality of the southern line of 110, and if that view was correct, the

"southeastern corner of lease No. 110" would be at H. on the plan M—78 used at the trial, "thence southerly to the northeast corner of an area," lease 429, in fact.

Now this area would be greater than a square mile. And either 430 is void for excess, or something in the description must be rejected. I give the defendant the benefit of the latter alternative.

On principles which I have already mentioned I think that the reference to the "corner of lease No. 110" in that call, which is really out at sea, should be rejected.

Then having the course of the north line which is N. 68 degrees E., and having the locality of lease No. 429 (No. 64—58) the side line of which is N. 68 degrees E. 154 chains, those side lines can be closed by a line drawn from the south side line at I. on the plan M—78, used at the trial, to intersect the north side line at a point which will make the contents of lease No. 430, one square mile.

This view will enable lease as well as the old lease 12—51—41, to be located without violating the statute restricting the dimensions of a coal lease, and does not require one to declare lease 430 void for exceeding those dimensions. The other alternative is that it is void for excess.

At the hearing we were reminded of the harshness of declaring a lease void on any such ground as excess or restricting it, and it was sought to claim an equity against the Crown because the map used in the mines office showed certain conditions when the application for 430 was made, namely, a space not exceeding a square mile; a sort of "we followed your map" argument. This is all the law in the statute on the subject of that map in respect to coal:

"There shall be kept in the office of the commissioner maps of the different mining districts in the Province, on which shall be delineated as accurately as may be all the areas or tracts of ground under license or lease.

"(3) Such maps and plans shall be open to the inspection of the public."

This map in practice commences with a blank sheet for a district and is made up piecemeal. After the application for a license or lease is made, the description is plotted up the map by scaling, generally in relation to some application already plotted. If a survey on the ground was made by the department for every application the plan would be moderately accurate. But even the statute does not require this I think, and in fact it is not in many cases made. By section 205, in the case of an application for a license to search, the commissioner is to have the land surveyed "when he deems it necessary" at the expense of the applicant. And by sections 194, 195, in the case of an application for a lease,

there is to be a survey when the area is "selected from a tract" covered by the applicant's previous license, generally a five square mile area, again at the expense of the applicant. But in the common case under section 27, where there is a lease without any previous license, the Act seems to require no survey to be made. At any rate the applicant can have the official survey made under the statute by paying for it. The defendants had none made. The description and hence the way in which it is plotted on the map are all at the risk of the applicant.

As has often been said under this Act the commissioner has no discretion, his action is purely automatic.

I have already referred to the evidence of Mr. Hall as to the absence of surveys. In respect to the map, he says, page 83:

"Q.—This plan M—122 shows here leases 427 and 426, just take those for example. That plan was made up about the time their applications were made? A.—I fancy that part was plotted then. It may have been plotted before then. When the applications for 426 and 427 were made would be the time when this plan was plotted.

"Q.—You plotted 427 then? A.—Yes, I plotted it as near as I could from the description contained in 51—41 and afterwards checked the applications of the Dominion Coal Co. for new leases with that plot as nearly as I could.

"Q.—This representation of lease 427 is the result of your examination of the previous plans, and of the description furnished by Mr. O'Dell of the Dominion Coal Co.? A.—It is.

"Q.—The boundaries of 427 as plotted by you on this plan were plotted by the information you got from the previous plans and from the description you got from Mr. O'Dell and from the Dominion Coal Co. of the previous lease? A.—Yes, as nearly as I could do it.

"Q.—These leases 52—42 and 110 were brought down to the same base line to make the thing look consistent? A.—Yes, exactly, to make it look consistent.

"Q.—What do you use these plans for? A.—Simply for the location of areas applied for from time to time under licenses to search, and lease.

"Q.—These plans are not laid down by actual survey? A.—No.

"Q.—I suppose you know nothing as to the accuracy of any of these plans. A.—No.

"Q.—I am asking you as to the location of 50—40 on plan M—122; lease 50—40 has a certain location there, has it the same location on this plan M—D; is there any difference? A.—Yes, there is a difference.

"Q.—51—40 is a renewal of 40? A.—Yes.

"Q.—When you get your application you have your description before you? A.—Yes, and then we plot it down.

"Q.—This change of location of lease No. 40 on your plan was made when you got the application for renewal? A.—In December, 1906, yes.

"Q.—That was the first time it was suggested to you that the old map was wrong? A.—Yes, that was the first time. These were the applications made by the Dominion Coal Co. on December 28, 1906."

The map is not the registry of the several applications, licenses or leases and the plans annexed. There is such a registry kept in pursuance of the statute, § 104, but this map is not that.

The evidence shows too that the defendants relied upon their own surveys, and that when 12—51—41 was moved further south in accordance with the application and is now 427, 52—42 and 110 which had the same base line were on the new map brought down to the same base line "to make the thing look consistent."

In conclusion, I think there is no equity against the Crown in respect to this map. The lessee too had two chances here—the company's predecessor when he first took up the area and the company itself when it surrendered, as already mentioned, all of the old leases along the shore because they were excessive, and took out new ones.

I have come to the conclusion that there is vacant land, viz., the space as shown on the plan M—78, used on the trial, between H. S. K. and K. G., prolonged seaward N. 68 degrees E., and that the space is not covered by lease 430.

This brings me to the point of remedy. If I had come to the conclusion that lease No. 430 was void for excess, there would be no difficulty about the remedy, viz., to have the lease canceled because the Crown had granted too much, or because it was a cloud on the title. Attorney-General v. Chambers, 4 De G. M. & G. 206; Queen v. Hughes, L. R. 1 P. C. 81. But it is contended that the Attorney-General cannot have a suit for a declaratory judgment that there is vacant land there without having also a cause of action, an intrusion or the invasion of some right. He may not have to ask for the ancillary relief, but he must have the occasion for it, and particularly here when under the Act the commissioner has power to hold an investigation, and from his decision an appeal lies to this court. And it is contended that thus the case is brought exactly within Barraclough v. Brown (1897), A. C. 615.

I will endeavor to distinguish that case presently, but I must go back a little.

It is evident that submarine areas can only be worked by having access from the shore. If one looks at plan M—122 he will see that the person or company who has the inshore leases dominates the value of the leases outside if there is no access to the latter. The legislature, very late in the day, because it had not reserved space for access to those outside

areas, passed legislation to enable space through coal areas for tunnels to be appropriated or taken compulsorily. I refer to the Acts of 1907, c. 32 (N. S.). There is to be a notice to treat, and on refusal an application is to be made to the Governor-in-Council, which is constituted the tribunal for fixing the compensation. The application must disclose among other things the names of the various owners of the intervening areas through which it is proposed to tunnel, and service must be made on them, and so on. Now there is provision for payment into the supreme court of the compensation which may be awarded if (among other cases) the applicant has reason to fear any claim or incumbrance affecting the title, to be distributed by the court.

But in a case like this it is almost indispensable that the applicant should find out who his opponent happens to be.

I think that in England the question of title to the land taken under such compulsory acts is not usually threshed out before the tribunal which fixes the compensation.

It makes a great difference to the person having outside submarine areas whether in order to reach those areas he is simply to mine his own coal, or whether in whole or in part he must expropriate and sit down and count the cost of expropriation prices. It makes a difference to the government revenue derived from royalties if the outside areas are to remain idle because access to them by the owners is cut off owing to the high price of expropriating space for a tunnel through miles of the inshore lessees coal. There is a public interest there.

The relator treating the defendants' application for lease 420 or 430 as void for excess, or because it did not cover the area, put in, on the 2nd of April, 1907, applications for the space. On the 24th April, 1907, the relator's solicitor thus addressed the commissioner:

"On April 2nd, 1907, Mr. Sydney Burchell applied for three leases of coal on land covered with water, situated between the entrance to Little Bras d'Or and Little Pond, in the County of Cape Breton. Will you kindly let us know when we may expect these leases to be issued, as Mr. Burchell requires them as soon as possible in order to commence work, making a tunnel through them to some outside areas."

On the 30th April the Deputy Commissioner replied:

"In answer to your letter of the 2nd. inst., I beg to say that three applications for leases which were claimed to cover vacant ground existing between south line of the Dominion Coal Company's leases Nos. 110 and 52—42 and another area applied for by the same company and the north line of area, formerly lease 207, owned by said company were lodged with us on April 2nd, but they were not recognized nor do I think they can be until such time as our plot of locality is proved incorrect and that such vacancy actually exists, consequently there are no leases to issue."

On the 6th May, 1907, lease 430 was issued, and on the 5th of August this action was commenced.

The seams of coal belong to the King in his right of the government of Nova Scotia. The leases run in his name. One of the very latest utterances of the legislature, Acts of 1906, c. 16, § 2, enables the commissioner in a certain contingency to enter and take possession of, on behalf of the Crown, the areas covered by a lease "if it is in the opinion of the Governor-in-Council necessary or expedient in order to preserve and protect the property and interest of His Majesty the King as lessor of the area, etc."

It is very old law that the King may sue in any court he pleases. Chitty on the Prerogatives of the Crown, 244. It was recognized in the courts below in Ontario in Attorney-General v. Mercer, 8 App. Cas. 778, P. C., an information in chancery for the escheat of lands of Mercer who died without heirs.

Then it is the common law and has been held from time immemorial that the prerogative rights of the Crown cannot be restricted by an Act of Parliament without express words. Attorney-General v. Constable, 4 Ex. D. 172.

Then as to the Attorney-General's powers in respect to proceeding by an information and with a relator, I refer to what was said by Earl Halsbury, then Lord Chancellor, in the London County Council v. The Attorney-General (1902), A. C. 168, which, although that case was brought in respect to the breach of a statute, is quite applicable here.

Where the Crown is interested, as where its lessee is defending his rights under it against another subject, the Attorney-General may prevent that title being decided in any suit between subjects, and is entitled to have it decided in a proceeding to which the Crown is a party. Attorney-General v. Barker, L. R., 7 Ex. 177, Lord Stanley of Alderly v. Wild (1900), 1 Q. B. 256.

By statute the Attorney-General has the powers and functions in Nova Scotia which the Attorney-General of England has in England. The Judicatures Rules of Nova Scotia, Order I, rule 1 (as in England), provide for this proceeding by information calling it an action.

These rights are not affected, because there is another person (in this case the relator) who has an interest and has made applications for licenses or leases under the principal Act. In Osborne v. Morgan, 13 A. C. 237, Lord Watson said:

"Their Lordships do not doubt that in cases where reasonable grounds can be shown for interfering with the lessee's possession the Crown will lend its assistance in terminating the lease."

But I venture to think that the Attorney-General at least is not required to go, and there is no provision for his going, before the Commissioner

of Mines to have an investigation of the legal rights of the Crown in respect to mines under the provisions of section 20 and sections 87-93 of the Mines Act.

Under the Act the commissioner has two distinct functions, ministerial in respect to receiving applications for and issuing licenses and leases, registering them, and so on, and holding investigations, judicial or *quasi* judicial, merely in aid of the ministerial powers. The investigation is held in two cases, forfeitures of leases, not necessary to refer to, and under section 20, when an investigation is demanded by an applicant where the commissioner refuses to accept the application, or by a licensee or lessee who claims that another's application or license or lease overlaps his own. Drysdale v. The Dominion Coal Co., 34 S. C. R. 336, Killam, J. In the latter capacity besides the appeal the writ of certiorari has been sent to him. Queen v. Church, 23 N. S. R. 347; see also Australian Bank v. Willans, L. R., 5 P. C., 417. There has also been mandamus, Drysdale v. Dominion Coal Co., 34 S. C. R. 332, and I suppose all the remedies used by courts having corrective powers, as this court has, may be used in respect to that tribunal.

In respect to the ministerial functions this court acts upon the parties to the contest, as in Fielding v. Mott, 18 N. S. R. 347; 14 S. C. R. 254, which was a simple action of ejectment by a lessee to recover a gold mine from another lessee. It was not contended there that the jurisdiction of the commissioner to investigate prevented an action of ejectment.

The insufficiency of the investigation to deal with all questions which may come up was shown in the case of Mott v. Lockhart, 8 A. C. 572 an appeal from this court. Sir Arthur Hobhouse, for the Privy Council, said:

"They say that the appellants stole a march on them and violated some understanding with them. But if the fact were so the commissioner could pay no attention to it. He is the creature of the statute and has no jurisdiction given him to enforce equities entirely outside of the statutory proceedings."

I desire also to quote from a judgment of the Supreme Court of Canada a case of mandamus, for there is no appeal to that court from this on an appeal from the commissioner, which is a reason in itself for the view I am advancing. In Drysdale v. Dominion Coal Co., 34 S. C. C. 332, Mr. Justice Davies said:

"From the evidence before the commissioner it appeared that Murray's lease, granted some years before the Dominion Coal Co.'s application was made, might overlap the lands applied for in the latter. Whether it would do so or not depended largely upon the construction of the lease and other facts to be determined. Were the posts and specific distances

in the description of the lands leased to control, and the reference to the original application for a license to search to be treated as *falsa demonstratio,* or was the latter line to control the specific distances? These were legal questions on which the commissioner, I think, had no right to pass. What lands were legally covered by Murray's lease was a question to be determined afterwards by the court in a proper action. No decision of the commissioner could either contract or expand the legal boundaries of Murray's lease. I conceive, therefore, that the commissioner might grant the Dominion Coal Company's application subject to and excepting thereout such lands as might be found and determined to be in the Murray lease; in other words bounding it by the lands, whatever they were, described in the Murray lease.

"Such a decision would leave the respective claims of the parties for adjudication by the proper tribunals," etc.

In that investigation there were three different appeals to this court from the commissioner, and four decisions by him or supposed decisions, for the difficulty always was to find out whether there had been a decision or something less.

I refer to the following cases in our own court, two of which went to higher courts, to show that this practice of proceeding by information is not unusual in the case of disputes under the Mines Act.

Attorney-General v. McDonald, 2 N. S. Dec. 125; The Queen v. Snow, 3 N. S. Dec. 373; Attorney-General v. Fraser, Russell's Eq. D. 275, on appeal 3 R. & C. 351; Attorney-General v. Reynolds, 27 N. S. R. 184, (1896) A. C. 240; Attorney-General v. Sheraton, 28 N. S. R. 492; Attorney-General v. Temple, 29 N. S. R. 279, 27 S. C. C. 355.

One of these, Attorney-General v. Reynolds, 27 N. S. R. 184, on appeal to the Judicial Committee of the Privy Council, (1906) A. C. 240, is in point in respect to this kind of proceeding by information, and notwithstanding that there is in the Mines Act provision for an investigation and a decision by the commissioner with an appeal to this court. Indeed in that case there had been an investigation before the commissioner, both parties attending, and the decision of the commissioner was against the person who afterwards without appealing proceeded by way of information, he being the relator in that action and he succeeded in both courts. By reference to the judgment of this court it will be seen that it had been contended that the decision of the commissioner on the investigation constituted *res adjudicata.* If that contention was good the Judicial Committee would have been obliged to have decided the case the other way.

I also refer to the case of the Dominion Coal Co., 42 N. S. R. 108. I think that it is going entirely too far to say that this court is ousted of

its jurisdiction, that the investigation before the commissioner is an exclusive remedy. In Oran v. Brearey, 2 Ex. D. 348, it is said:

"No rule is better understood than that the jurisdiction of a Supreme Court is not to be ousted, unless by express language in, or obvious inference from, some Act of Parliament."

Suppose that the licensee or lessee complained about will not, perhaps because he has been long in possession, attend before the commissioner in response to the notice. Then, for there is no provision for judgment by default, I suppose there is to be an *ex parte* investigation, and the commissioner decides, say adversely, to the person who has not attended, and grants the person attending a license or a lease over the other's license or lease. I have never heard it disputed that the ordinary courts are open to these parties to proceed in respect to their titles.

But assuming that the defendants can go behind the Attorney-General and contend that the relator should have proceeded with an investigation before the commissioner rather than by this action, I think he would be met with the difficulty that the commissioner's powers are inadequate for a case of this description. The commissioner's jurisdiction is but an investigation in aid of his ministerial powers. He cannot compel the defendant to come in and be bound by the decision. The investigation can only be of the simplest character. It is only for the purpose of location. He could not, I think, set aside his own *de facto* lease purporting to cover the area, but void for excess.

Coming back to this case, as to the cause of action, there is of course a peculiarity in the circumstances. These are not only submarine areas, but the seams of coal are below the surface. The defendants may not require them for half a century. It is difficult to invite or provoke an intrusion or threat.

But I think that the Attorney-General has a cause of action, and also that in addition to the declaration consequent relief by injunction is appropriate. This need not be set out in the claim for the declaration of right, or claimed, although that has been done. If it is set out it may even be refused and the declaration alone granted. That has happened. Order 25, r. 5, is the same as the English rule:

"No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not."

The latest utterance I have seen upon that rule, and it is, I think, at variance with something cited from single judges in the case of Chapman v. Michaelson (1909) 1 Ch. 238.

The Crown has always had the right to issue a commission to hold

an inquest as to the title of the Crown to lands. Chitty on Prerogatives, 246.

In Robertson on Civil Proceedings of the Crown, 238, it is said:

"Formerly the Crown used at times to issue a commission for the holding of an inquisition as to the title of the Crown to lands, in cases where the procedure by English information would have been equally available. The last reported instance of this seems to be R. v. Yarborough (1828), 1 Dow. & Cl. 178, a case as to foreshore."

There is a precedent of an information at page 286 used in Attorney-General v. Constable, 4 Ex. D. 162.

Without going that far here for a cause of action, where the registry of something affecting the title is as important as an active intrusion, surely the Attorney-General would have a remedy on the ground that as to the mere excess shown on the official plan and in the records of the leases in the Department of Mines, there is a cloud upon the title. I have already cited authority to show that on that ground he would have an information to cancel the whole grant in consequence of the excess. I think that an injunction to prevent the defendants from setting up the map and the records would be appropriate.

As to Barraclough v. Brown (1897), A. C. 615, which was cited, the statute provided not only for the creation of the expenses sought to be recovered in that action, but it gave the court, a court of summary jurisdiction, exclusive jurisdiction for the recovery of the expenses. There was no common law right to recover the expenses, and the action was to attempt to recover them in the High Court which had not on that account jurisdiction, but it was contended that although the jurisdiction failed still there could be a declaration of the right under the rule just cited. It was refused. That this is so appears from what Lord Watson said, page 622: "The right and the remedy are given *uno flatu* and the one cannot be dissociated from the other." Then he says that the statute "committed to the Supreme Court exclusive jurisdiction." And Lord Davy, page 624, said:

"There is nothing whatever in the rule to enable the court to make a declaration on a subject as to which its jurisdiction is excluded by statute."

My argument has already been made to show that the jurisdiction of the commissioner to investigate is not the exclusive remedy, that there is a cause of action in respect to which this court has jurisdiction to grant a remedy irrespective of the declaration of right. Therefore, I think that the declaration which I have already indicated may be made, and, in addition that the plaintiff may have a restraining order as indicated.

Since the judgment appealed from was given and the appeal asserted, the legislature has passed an act which the defendant company contends

has rendered any decision of this court useless. That even if the Attorney-General succeeds, has a declaration and ought to have the map and records corrected, the relator will not be able to obtain from the commissioner a lease of the vacant ground as declared, or to expropriate it in order to construct a tunnel through it to his off-shore areas. Even if that may be it is irrelevant. The action may be and ought to be decided.

But I think that the construction and purpose of that act is not what was contended for by the defendant. The act which I will quote is 1908, c. 11, of the statutes of Nova Scotia:

"Whereas disputes have arisen as to the location and boundaries of certain submarine coal mining areas now under lease or license to search, or under application for lease or license to search, situate within the territory mentioned in the first section of this act; Be it therefore enacted, etc.

"1. Notwithstanding any of the provisions of the Mines Act, or any amendments thereto, the commissioner * * * shall refuse any application for a coal mining lease or license to search of or over any submarine area or tract of ground comprised within the territory situate * * * (describing it), and shall refuse to grant a lease of any area or tract of ground comprised within said territory, notwithstanding any application for lease thereof heretofore made or any existing license to search.

"2. The commissioner * * * shall cause to be made all surveys, investigations and inquiries necessary to determine the location and boundaries of any or all leases heretofore issued of areas or tracts of ground comprised within the territory mentioned in the next preceding section."

As I have intimated, the action of the commissioner under this Act is automatic. From the cases of Attorney-General v. McDonald, 2 Nova Scotia Dec. 125, to In re Hanright, 37 N. S. R. 284, the cases all show that he has no discretion to refuse or receive an application. The disturbance of any lease as the result of a decision might lead to the disturbance of other leases dependent for their boundaries upon the description in that lease. For these are submarine areas and there are no monuments. And the displacement might lead to applications by outside parties which, as I have indicated, the commissioner would not have power to refuse. And these might injure the rights of those who have at least equities against the Crown. This legislation, is, I think, an attempt to lock up the district for the time, that is, during the pendency of litigation to settle the difficulty, so that it will not be open for applications or even the granting of licenses or leases already applied for.

The provision contemplates surveys and investigations, but they would be useless unless they are to be followed by the issuing of licenses and

leases in accordance with the result. If this action in this court is destroyed by this legislation, the powers of the commissioner to investigate under the principal act is also destroyed, that power to investigate being founded on or annexed to the power to issue licenses or leases.

The Act of 1908 appears to be only an extension of the principle of section 17 of the Mines Act to the present dispute in this court. That section (and its wisdom, from what I have already said, is obvious) is as follows:

"No application shall be accepted for a license or lease of any areas or tract of ground the right to a license or lease of which is at the time of such application in dispute before the commissioner * * * or before any court of appeal or until the time allowed for appeal from any decision in respect to such right has expired."

But the Act of 1908 is only intended to lock up the district while the disputes involved in this action are pending and those resulting from the determination of it. The legislation contemplated that the commissioner might after that receive applications or issue licenses or leases, or at least that it would be very easy, when the action was disposed of and the rights adjusted in accordance therewith, to pass legislation to unlock the district again. It could not have been intended to forever prevent the issuing of licenses and leases in that district because the terms of leases and licenses and even of renewals have limits in point of time. Indeed, at the very session following that one, an amendment was passed releasing part of the district which had been locked up.

Over a year and a half has elapsed since the act was passed and it does not appear that any surveys or investigations have taken place pending the decisions of this court which would indicate the extent that the boundaries are likely to be displaced, if at all.

It will be novel indeed that the very legislation which was passed to aid in carrying out the principles settled by the decision in this action and in applying them to the adjoining areas should be used to defeat the action and prevent anything being decided, and that too after a most expensive contest. It is said to be inexpedient to make a declaration of the parties' rights and I think that is an unusual doctrine in a court of law, and particularly in a suit in which the Attorney-General is the plaintiff. I say that the legislation contained in the Act of 1908 is useless to give the relator his rights without the aid of this action because the defendant need pay no attention to anything attempted to be done under it. The relator is entitled, if nothing else, to have it determined for the mere purpose of deciding the question of costs incurred before that act was passed.

In my opinion the appeal should be allowed with costs of the action, and there should be a declaration made and a restraining order granted in the terms indicated, against both defendants.

MEAGHER, J., read an opinion (not filed) in which he was understood to state that his views were sufficiently disclosed in his opinion as reported in the case In re Dominion Coal Co., 42 N. S. R. 108. Where a discretion was given to the court it must be exercised with great care and it would not be exercised where the result would be embarrassing. He could not persuade himself that the court should make a declaration at this stage because it might defeat the object of the statute or embarrass the inquiries to be made under it. With respect to the claim for an injunction he need only say that it could not be granted if the declaration were upheld. He thought the appeal should be dismissed.

LONGLEY, J. Previously to August, 1907, the Dominion Coal Co. were the holders of a number of submarine coal mining leases, situate near Point Aconi, north of Sidney Harbor. They had been acquired by the Dominion Coal Co. from the previous holders, and they were represented on the plan in the Mines Office as occupying the whole space along the shore for a considerable distance.

Mr. J. Sydney Burchell, the relator in this action, a few years ago, and long after the Dominion Coal Co. had obtained a transfer of their leases, applied and obtained leases of a number of submarine areas outside of those held by the Dominion Coal Co. and abutting thereon. By some means or other, possibly by having a survey made of his own areas, Mr. Burchell seems to have discovered that the plan of the submarine areas of the Dominion Coal Co. was made upon an erroneous conception of the configuration of the shore in that vicinity. This was in no wise due to any fault of the Dominion Coal Co. or their predecessors in title. If the geographical outlines of the country in the vicinity of these areas were inaccurately copied upon the official plan in the mines office, it is not quite clear that the Dominion Coal Co. had any means of rectifying this. However, when it became known that certain physical features on the coast had been erroneously represented on the plan, and that this fact might lead to an indication of vacant land when the leases were applied to the actual configuration of the land, the Dominion Coal Co. surrendered certain of their leases and took up others, designed, as far as it was in their power to do so, to cover every part of the area which they had under lease.

On the 2nd day of April, 1897, Mr. J. Sydney Burchell applied at the mines office for a lease covering some of the identical area which the Dominion Coal Co. had, or were assumed to have had, under lease, and the commissioner of mines declined to receive this application on the ground that there was no vacant land in the area applied for.

Thereupon, on the 5th of August, 1907, Mr. Burchell, having previously obtained the use of the name of the Attorney-General by fiat, issued a

writ against the defendant, Dominion Coal Co., under the Judicature Act (the action being one which before the Judicature Act would have been brought by way of information in chancery). The objects of this action were principally twofold. One was to have a lease issued to the Dominion Coal Co., No. 430, set aside as containing more than one square mile and for the uncertainty of its boundary lines, and also a declaration that there was vacant land, not covered by any lease or application for lease or license to search, and which the said relator covered by his application made on the 2nd April, 1907, and which he claims he is entitled to have issued to him by said Commissioner of Mines. A defence covering all these points was filed by the defendants, and the action came on for trial before Mr. Justice Russell in Sydney, in January, 1908.

Mr. Justice Russell in his judgment finds that the lease No. 430 does not exceed one square mile in extent, and in respect to the declaration that there is vacant space, he decides that he cannot enter upon that inquiry as it is a matter for the Commissioner of Works and Mines, and could only come before the court on his refusal to grant a lease.

The plaintiff has brought the matter by way of appeal to this court from its decision.

Since this cause was heard and determined by Mr. Justice Russell the position of matters between the parties had been considerably affected by an Act of the Legislature of Nova Scotia, passed the 16th April, 1908. By section 2 of this Act, it is provided:

"The Commissioner of Public Works and Mines shall cause to be made all surveys, investigations and inquiries necessary to determine the location and boundaries of any or all leases heretofore issued of areas or tracts of ground comprised within the territory mentioned in the next preceding section."

The area described in the next preceding section completely covers all ground which forms the subject-matter of this action. I can only regard this section as expressing the intention of the legislature that the determination of all questions in respect of boundaries, including the extent of any areas, so far as the submarine areas near Point Aconi are concerned, is to be imposed upon and vested in the Commissioner of Works and Mines, and this court is relieved of the responsibility of dealing with this question altogether. I think it proper to add, however, that if this legislation had not been passed, I should have still felt that no good grounds had been shown for disturbing Mr. Justice Russell's judgment on the question of lease No. 430, nor, after a careful examination of the authorities, would I have felt disposed to give as large an application to the *dictum* of Lord Chelmsford in R. v. Hughes, as did the learned judge below. I think ample authority is found in recent decisions to justify the holding that the addition of a few acres more than one square

mile in the issue of any lease does not necessarily make it void, but in respect of the matter before me, especially in view of c. 11, § 2, of the Acts of 1908, I have no difficulty in reaching the conclusion that the plaintiff completely fails in respect of that part of his action which attacks the validity of the defendant's lease, No. 430.

There remains only one other contention of the plaintiff upon which we are called upon to make a determination, namely, a declaration that vacant land exists somewhere within the area generally covered by the defendants' leases. On this point, also, the legislature has undertaken to deal. Section 1 of chapter 11 of the Acts of 1908, provides:

"Notwithstanding any of the provisions of the Mines Act or any amendments thereto, the Commissioner of Public Works and Mines shall refuse any application for a coal mining lease or license to search of or over any submarine area or tract of ground comprised within the territory situate between the prolongation northeastwardly of a line drawn through the middle of Sydney Harbor and a line parallel thereto from a point on the shore near Cape Dauphin passing through Bird Island, and shall refuse to grant a lease of any area or tract of ground comprised within said territory notwithstanding any application for lease thereof heretofore made or any existing license to search."

It is quite clear that the legislature has determined that no lease shall be issued of any land which shall be found to be vacant within the area covered by the block of leases now, and for some time past, held by the Dominion Coal Co. It is not necessary, as a rule, to comment upon the action of a legislature, which is the supreme law-making power in the land, nor is it necessary to make the slightest reference to the wisdom or propriety of the section above quoted. To my mind it can only bear one interpretation, namely, a commendable disposition to prevent any outsider from interfering with the area of coal leases which the Dominion Coal Co. has acquired in good faith and holds under a bona fide belief, derived from the plans in the mines office, that its areas cover the entire block.

It was urged in the argument that the legislature, having thus withdrawn these areas from lease, a declaration that vacant lands exist within this area would be absolutely purposeless, inasmuch as it would be of no benefit whatever to the relator in this action. While proceedings are taken in this case in the name of the Attorney-General and must, strictly speaking, be regarded from this point of view, a very strong impression exists in my mind that these proceedings are in reality carried on by the relator in the name of the Attorney-General for the purpose of furthering his own interest. It can scarcely be assumed that the legislation to which I have referred could have been adopted if opposed by the Attorney-General. But, in spite of this impression, I feel that I am called upon to

deal with the issue precisely as if the Attorney-General were carrying on the suit solely in the interests of the Crown, and, therefore, I conceive that the Crown may be entitled to a declaration that the King has vacant land in this area notwithstanding the fact that the legislature has prevented present vacant land from being leased. Such being my view, it becomes necessary to determine how far the plaintiffs have been able to establish clearly the existence of vacant land within the area now in dispute.

The onus of establishing vacant land is clearly upon the plaintiffs and, as a declaration of vacant land would be clearly derogatory to the rights of the defendants, the evidence must be clear and satisfactory to justify a judicial pronouncement whereby a portion of the area which defendants have long held under lease shall be declared to be in the King. The evidence which the plaintiffs offer in support of the proposition of vacant land is based chiefly upon the boundaries in the old lease No. 41. According to the configuration of the land as now discovered, the southern boundary of that lot could scarcely be extended to point G, where it is located on the plan, but it must be remembered that when the lease was issued it was based upon the plan in the mines office in accordance with the configuration then appearing upon their plans. Upon the geographical outlines of the coast, as then conceived, and as represented plainly on the plan accompanying their grant, the southern boundary of No. 41 would extend to the south of Alder Point to G. Leases 42 and 110, lying to the east of this lot, were, in the plan, made coterminus with lease No. 41 on their southern boundary. When it was found that the configuration upon which these leases had been issued was inaccurate, the defendant surrendered lease 41 and some others in the vicinity and took out others. The one formerly known as No. 41 now appears as No. 427, and its southern boundary is distinctly placed at G, and upon its present boundaries does not exceed one square mile in extent. It was argued by plaintiffs that if lease No. 41 were extended to point G, at the southern boundary it would exceed one square mile, and so it would, having regard to the later and more accurate configuration of the shore, but it would not necessarily exceed one square mile upon the configuration then conceived.

As leases 42 and 110, immediately east of 41, now 427, have their southern boundary made coterminus with the boundaries of 41 and 427, there would in this case be no vacant land, and 430 would include every acre of vacant land and would be less than one square mile in extent.

The defendants, in addition to contesting the contentions of the plaintiffs in regard to the location of 41, 42 and 110 on the north, have endeavored to establish a location for the areas to the south of 430, which would extend that area considerably farther north than it appears upon the

plan. This is done by giving a somewhat more northerly location to lease No. 54, and then widening each of the leases between that and 429 by applying a different interpretation to the words "parallel to the shore." On the plan the lines of said grant have been so located as to make their eastern line, as well as their western coast line, conform to the configuration of the coast, whereas it is claimed that the word "parallel" when applied in legal cases to the plotting of land does not necessarily imply a mathematical parallel, but a general direction. See Bouvier's Law Dictionary; 2 Appeal Cases 423, 5 Johnston, 489. If the usual sense in which "parallel" is used to denote general direction were applied to these areas south of 430, the effect would be that 430 would be located considerably north of its present position on the plan. It is not necessary, from my point of view, to give especial regard to this contention, as I am of the opinion that the plaintiff has failed to show any vacancy between 430 and 42 and 110. The most that can be said that the plaintiff has done is to throw some doubt as to the precise position of 42 and 110. I think the preponderance of evidence is that their southern boundary is coterminus with that of lease 427, but, even if I entertained any vague doubts upon this point, I would not conceive these as forming any basis for a declaration of vacant land. Such a declaration would be a judicial determination, which would permanently affect the defendants' rights, and it would be unjust and obnoxious to the spirit of the law to destroy long enjoyed rights on mere surmises and vague conjectures.

The whole question of a declaration is of no importance except as affecting the costs of this suit. Under outstanding legislation, the relator can take nothing, if such declaration were made, but I think the plaintiffs have failed to clearly and satisfactorily establish vacant land and under all the circumstances surrounding this case, I do not think that any court of law would be disposed to lend any especial countenance to such a proposition. It is based solely upon a technicality and would have no foundation except from the accidental inaccuracies of the mines office plan, upon which the defendants in good faith have relied; indeed, have been compelled to rely. I think the appeal should be dismissed and the plaintiff's action dismissed with costs.

It was objected by the defendants that the trustees for the bond holders were not joined in this action as their rights will be affected by any decision in this cause. An application was thereupon made by the plaintiff that the trustees of the bond holders should be joined with the defendants in the action. This fact in no way affects the determination which I have reached, which would have been the same if the trustees had been joined at the beginning.

Appeal dismissed without costs.

In re DOMINION COAL CO.

[Supreme Court of Nova Scotia, September 2, 1907.]

42 Nova Scotia 108.

Coal—Licenses to Search—Leases—Conflicts—Powers of Commissioner.

The Dominion Coal Company, who were holders of a license to search for coal, covering an area of five square miles, made application under the provisions of the Mines Act, R. S., c. 18, § 194, for a lease of an area of one square mile of the land included within the boundaries of their license to search.

The description in the application or the lease described the area applied for as situated at the southeast corner of the area originally licensed to M. and then westwardly, by the southern line of said lease, two miles.

A question having arisen as to the exact location of the area under lease to M. and that applied for by the company, the commissioner of mines ordered a survey, as the result of which it was found that a portion of the lease granted to M. extended beyond the boundaries of his license to search and included about one-half of the area applied for by the company.

The commissioner under these circumstances declined to issue the lease applied for by the company, and directed the issue of a lease the boundaries of which were described in such a way as to exclude any portion of the area under lease to M.

Held, by the majority of the court (adopting the opinion of Davies, J., in Drysdale v. Dominion Coal Co., 34 S. C. C. 332), that the matter was one involving a legal question upon which the commissioner had no right to pass; that no decision of his could either contract or expand the lease to M., and it was therefore his duty to have granted the application made by the company, excepting thereout such land as might be found and determined to be included in the lease to M., leaving that question to be subsequently determined by the court in a proper action.

Also, that the commissioner exceeded his powers in relation to the survey ordered by him, such power (§ 195), being confined to a survey of the tract of ground selected out of the area covered by the license to search, and giving no power to direct the survey and the preparation of a plan of another tract of ground.

Also, that the commissioner exceeded his authority in permitting M. to go outside the boundaries of his license to search and include in his lease land already covered by a license to search issued to another party and assigned to the coal company.

Appeal from the judgment or decision of the Hon. W. T. Pipes, Commissioner of Public Works and Mines for the Province of Nova Scotia, made March 28, 1906, refusing a lease of mining areas applied for by the Dominion Coal Co. The facts are fully set out in the judgment of Graham, E. J. Appeal dismissed September 2, 1907.

NOTE.

Sufficiency of Application for License.

An application for a license has been held to be sufficient although the description contained in it is based on an application made by other persons which at the time is not on file with the commissioner of mines, Townshend, J., saying: "I do not hold that the words in the statute are to be read with the same strictness which would be applied to a deed in a more cultivated or wooded locality, and they must also be read with reference to the object of the act, which was to have the areas sufficiently defined

In support of the appeal—J. J. Ritchie, K. C., and H. Lovett, K. C.

Contra—A. A. Mackay.

GRAHAM, E. J. The extract which I shall presently quote from the opinion of Mr. Justice Davies in the Supreme Court of Canada, when delivering the judgment upon the mandamus requiring the commissioner of mines to hear this case, is so very much in point, and so much in accordance with my own view, that it will not be necessary for me to add very much to it, except in showing its bearing.

The scheme of the Mines Act in respect to coal is to grant a license to search for coal which may cover as much as five square miles, and it is good for eighteen months. But applications for licenses, which are called second rights, may be put on the same area during the currency of a license to search, but only to become a useful license when the first or previous useful license expires, and it will be good for eighteen months after it becomes a useful license.

During the currency of a license the holder (R. S. c. 18, § 194) may select, having priority, a square mile out of the five square miles, and obtain a lease for the purpose of mining the coal which he has been exploring for. Whereupon the next license springs into use for the balance of the area. A lease may be applied for without any preliminary license to search (R. S. 1900, c. 18, § 27).

The law now (R. S. 1900, c. 18, § 15), as it was in 1892, c. 1, §§ 17, 95, is to the effect that "No application shall be accepted for areas or tracts of ground already applied for or under license or lease except as in this chapter provided." Areas may be licensed or leased only after the expiration of the licenses or leases upon them. R. S. 1906, c. 18, § 28 R. S. 1892, c. 1, § 147.

John White had two licenses running on a tract applied for January 24, 1893, the first of which would expire and did expire July 24, 1894, and the second in the ordinary course would expire January 26, 1896. These licenses were transferred to Henry M. Whitney, March 11, 1893. On October 12, 1894, the Dominion Coal Company applied for a license, Exhibit F.

to present a second grant over the same ground involving disputes." In re Malaga Barrens, 21 Nova Scotia 391.

In Fielding v. Mott, 18 Nova Scotia 339, defendant's application described the areas applied for as "commencing at a birch tree marked A. D., and being on the east side of Salmon River about five miles above the bridge." It appeared that the tree was 2000 feet distant from the river, and considerably less than five miles from the bridge in a direct line, and it was held that the tree being otherwise sufficiently identified the description was not vitiated by the errors as to locality and distance.

On the 24th of July, 1897 (Ex. G.) the Dominion Coal Company applied for a lease of a mile, and it is undisputed that it is selected out of the area described in its license to search. The description in the application for the lease is as follows:

"Beginning at the northeastern corner of area licensed Dominion Coal Co., January 25, 1896, marked 8 on plan in Mines Office, and at the southeast corner of area originally licensed Rev. J. Murray; thence westerly by the southern line of said Murray license 2 miles; thence at right angles northerly 40 chains; thence at right angles easterly 2 miles; thence northerly to place of beginning, said northeastern corner being distant 160 chains, N. 78 degrees west from the starting point of the Daly license, beginning at the southwest corner of area leased H. N. Paint, April 29, 1879, No. 88, which land does not exceed in extent one square mile at the price of $50."

The description of Mr. Murray's license to search dated December 9, 1890, is as follows:

"At the northwest angle of a license to search held by E. T. Mosely, dated September 2, 1890; thence running southerly by the western line of said license 2½ miles; thence at right angles westerly 2 miles; thence at right angles northerly 2½ miles; thence at right angles easterly 2 miles to the place of beginning, and being the area covered by Patrick O'Connor, September 4, 1890, which land does not exceed in extent five square miles, at the price of $30."

The description in his application for lease dated August 31, 1893, and in the lease dated October 5, 1893, is as follows:

"Beginning at a stake marked (J. M.) on the southern side of the Black Brook Road, being 8 chains, 44 links west of the gate leading to Widow Alex McDonald's house, and about 14 chains from the west side line of John Murray's area; thence south 15 degrees west, 38 chains; thence south 75 degrees east, 142 chains; thence north 15 degrees east, 45 chains; thence north 75 degrees, west 142 chains; thence south 15 degrees, west 7 chains or to place of beginning, being an area of one square mile selected out of license to search held by me, which land does not exceed in extent one square mile, at the price of $50."

It will be seen that one area bounds on the other, the company's area being south of Murray's. In order to determine what area or portion of the area properly belongs to the Dominion Coal Company, it is necessary to show the proper location on the ground according to its description (not according to what surveyors thought it was) and the Murray lease. And in doing that, which is a very usual thing to do, it is not generally considered that one is making any attack on the lease itself.

There are difficulties about that description. In Drysdale v. Dominion Coal Company, 34 S. C. C., at page 332, Mr. Justice Davis said this:

"From the evidence before the commissioner it appeared that Mr. Murray's lease granted some years before the Dominion Coal Company's application was made, might overlap the lands applied for in the latter. Whether it would do so or not depended largely upon the construction of the lease and other facts to be determined. Were the posts and specific distances in the description of the lands leased to control, and the reference to the original application for a license to search to be treated as *falsa demonstratio;* or was the latter line to control the specific distances? These were legal questions on which the commissioner, I think, had no right to pass. What lands were legally covered by Murray's lease was a question to be determined afterwards by the court in a proper action. No decision of the commissioner could either contract or expand the legal boundaries of Murray's lease. I conceive therefore, that the commissioner might well grant the Dominion Coal Company's application subject to and excepting thereout such lands as might be found and determined to be included in the Murray lease; in other words bounding it by the lands whatever they were, described in the Murray lease.

"Such a decision would leave the respective claims of the parties for adjudication by the proper tribunals," etc.

Before passing from that extract I cite the judgment of the Privy Council in Emmerson v. Maddison (1906) A. C. 569, to show that the crown may do what is suggested without first establishing its title to any of the area Murray may have taken in his location not covered by the description in his lease.

I also cite authority to show that the commissioner's powers to investigate and determine must all be found within the terms of the act. In Mott v. Lockhart, 8 A. C. 572, it is said in the judgment of the judicial cimmittee, with reference to the commissioner of mines:

"They (the respondents) say that the appellants stole a march upon them and violated some understanding with them; but if the fact were so, the commissioner could pay no attention to it. He is the creature of the statute, and has no jurisdiction given him to enforce equities entirely outside of the statutory proceedings."

During the argument of that appeal the members used language which will be found cited in Attorney General v. Reynolds, 27 N. S. R. at page 206, a case which also went before the Privy Council, and was affirmed, and I cite it to show that notwithstanding an investigation by the commissioner, the rights of the parties may be determined in a proper action.

In Fielding v. Mott, 18 N. S. R. 339, the commissioner granted to the plaintiff a lease over the defendant's lease, and he raised his contentions by an action of ejectment, and although they were rejected, no one con-

tended that the provisions for investigation were exclusive. Many actions of an equitable nature have been maintained to decide conflicting rights.

When the Commissioner of Mines, Mr. Church, commenced to investigate this matter, sections 20, 87 and 93 of the Revised Statutes 1900, c. 18, were not in force, and I think it is quite obvious that at that time he had no power to try the title to land or decide upon disputed boundaries. Whether those sections apply or not, when the later commissioner took up the case, I think that it was not intended that the commissioner should have that power. And if he has, it is a power which might well be kept in reserve in a complicated case until the courts tried it in one of the usual modes. I refer to the practice in Ontario, when a disputed title arises in an investigation, under a statute. Bennetto v. Bennetto, 5 Pr. 145 (Blake, V. C.); Smith v. Smith, 1 O. L. R. 404; Stroud v. Sun Oil Co., 8 O. L. R. 748.

I think the disputes as to title to land and boundaries are of too serious a character to be tried before the commissioner. True, there is an appeal to this court from his decision after an investigation, but there is no procedure, as in other courts, and no further appeal to the Supreme Court of Canada. At common law they could only be tried by action of ejectment or trespass, not even in chancery, and it would require very express legislation to show that a commissioner in such a summary way may try a title. And to put the company in a position to contest the title, the commissioner should grant a lease which will give the company a standing in court. If it is found to overlap legally the Murray area then, as to the extent of the overlapping it will be null.

There is a further question involved than the question of mere boundaries. I am also of opinion that the power of the commissioner to grant licenses and leases, and the right of the applicant to take the same, depends entirely upon the terms of the statute, and if they depart from them, the departure is simply void.

Rex v. Hughes, L. R., 1 P. C. 82; In re Hanright, 37 N. S. R. 284, citing Attorney General v. McDonald, 2 Geldert and Oxley, 125; Queen v. Snow, 3 Geldert and Oxley, 499; Attorney General v. Sheraton, 28 N. S. R. 499; Attorney General v. Temple, 29 N. S. R., 299.

So that if Murray, by reason of the license outstanding for White, had no right to apply for, and the commissioner had no power to grant, a lease transcending the boundaries of Murray's license to search, then it would appear that under this statute the excess would be null and as to that excess the company would have the title by virtue of its license and application for lease which take in that excess.

After the courts had granted a mandamus to hear the case, the then Commissioner of Mines, the Honorable Mr. Drysdale, held an investiga-

tion under the Mines Act, and his decision, dated the 15th day of April, 1905, contains this statement:

"I find that a portion of the area selected and applied for by the coal company is already covered by the Murray lease; that a lease of any such portion cannot issue to the coal company, but a lease will go to the company of that portion selected in their application for lease which lies outside of the area described in said Murray lease."

Before a lease was granted or any further action was taken upon this decision, the Hon. Mr. Pipes succeeded Mr. Drysdale in the office, and without perhaps noticing the language of Mr. Justice Davies, he sent a surveyor to the spot, and the surveyor, adopting his own or the deputy commissioner's construction of the description of the Murray lease, has placed the Murray leased area, to the extent of at least one-half of it, outside of the lines of the Murray license, overlapping one-half of the area applied for by the company, and Mr. Pipes has called the parties before him, and has decided not to grant a lease in the terms indicated in the extract from the opinion of Mr. Justice Davies, and allow the parties by a proper action in court, to have the question determined as to where the Murray lease is upon the ground, but to construe it for himself, and give the lease the description supplied by the surveyor, which will prevent the question from ever being raised in a court.

The surveyor evidently understood from his instructions from Dr. Gilpin, the deputy commissioner, that he was to assume that the Murray lease adready had been properly laid off on the ground, and that he was to exclude that location from the description furnished for the proposed lease to the company.

Now, section 197 of the Mines Act, under which the commissioner acted, or under which his action is justified, does not enable him to cause another tract of ground to be surveyed and a plan of that prepared, but only the tract of ground selected and applied for. That section no doubt applies to undisputed boundaries, as where the applicant's description is not sufficiently scientific for the plan of the department, or where its locality in respect to areas already on the plan has to be fixed for plotting on that plan.

Of course the locality of that tract depends on where the Murray lease is, and that difficulty, it is proposed by Mr. Justice Davies, should be solved in a particular way.

It is suggested that the coal company attend the survey, but it is not necessary to say that consent cannot give the commissioner jurisdiction. When a proper action is brought it will be time enough to determine whether, in the description of the Murray lease, the expression "being an area of one square mile selected out of license to search held by me,"

is to be rejected. I do not say that this is evidence in Dr. Gilpin's testimony, viz.:

"Because Mr. Murray declared he had all the necessary measurements to define the lease he was applying for. Q. Where did he say the position was? A. It was decided the position was inside the license to search he owned."

But I say that under this statute it is most important that the application should specify whether it is a selection from a license or an application for an uncovered area. And to the extent that it is now claimed by Murray that he has the right to take a lease exceeding the boundaries of his license, the land was already covered by one of the licenses to John White. And to this extent the statute was violated.

I do not understand that the scheme of the act is that there may be floating applications for licenses or lease put in for areas already covered by license to someone else which will come into use if that third person allows his license to expire. The provisions about competing applications presented at a given moment, and even almost simultaneous applications, the provisions for registery of application and the provisions permitting second rights, all so carefully guarded, show that no floating license, even as against a third person, is permitted.

I refer to McColl v. Ross, 28 N. S. R. 1, where a third person's license, Wallace's, prevented McColl's floating license from attaching, and operated in favor of a later application put in by Ross on the expiration of Wallace's license. The implication from the section permitting second rights was perhaps made clearer by the proviso in the section in the case of the first of McColl's applications, but in the case of his second application, there was no proviso, the law having then been amended. Moreover, the case, I think, shows that if Murray, instead of applying for a license had applied for a license (second right) it would only have been good as to the area in his first license, and void as to the area covered by the White license. That was the position of McColl's second application. It could not be running to come into force as a first right on one area at one date, and on another area at another date, namely, as the respective licenses expired on those areas.

But the question whether you are to reject the portion of the description as to the area leased being within the licensed area, or the portion as to the stake marked J. M., 8 chains, 44 links west of a gate, is a more serious question here than ordinarily occurs, because the registry is the important place to look for mining titles, the expiry of license and second rights, and the selection of an area for leasing. For four years it was supposed in the department, as Dr. Gilpin's testimony shows, that Murray's lease was within the boundaries of his license because it said

so. The registry showed it to be that way in consequence of that recital in the registered lease. It was not surveyed, and it was not until a survey was made July 16, 1897 (Exhibit R), that the fact of the stake, if the supposed gate was taken, showed the lease to be, as I have said, one-half outside of the boundaries of the license.

Meanwhile the company, which had acquired the John White licenses, had allowed them to expire; but they could have made a selection under them after the Murray lease was granted, and taken a lease. And they, being prior to the Murray lease, the lease founded on them would also have been prior to it. That would have prevented the Murray lease, admittedly dormant while the John White licenses were current, from coming in force after they expired, as the learned commissioner suggests it did.

I think that it is very dangerous to allow a registered document to extend and have effect beyond the boundaries which it recites upon its face, to the injury of a person who, from the fact of registry, is presumed to have acted to his prejudice upon the strength of the registry, and allowed his license to expire, merely because there is a stake marked J. M., also mentioned. Never (for the licenses to search adjoined each other) could the lease within the boundaries of Murray's license encroach on the company's license.

They would look at the registry and the plan annexed to the Murray lease and referred to therein, showing the area leased inside of the license to search, and adjoining the company's license, and the stake, too, on the plan, all I suppose, to scale, and the general plan required to be kept, also showing the Murray lease inside of the license and outside of the company's license; and then it is to be said that this is all to be rejected because there is a stake marked J. M. 7 chains 44 links from a gate, both of which have disappeared, and about 14 chains from the west side line of John Murray area, i. e., license to search, whereas it is as the surveyor has located it, 40.55 chains from that line.

Then of course Murray may contend that his license to search is not properly located, and that his lease is wholly within it. And that shows the necessity of some proper action in a court to enable these boundaries to be determined. So also, it can be determined in that action as to whether the decision of the commissioner, being that of an inferior court of limited jurisdiction, constitutes an estoppel, and that will depend on the terms of the statute, and whether he had jurisdiction to decide what he did, or whether Mr. Justice Davies has given the correct opinion. The decisions of the commissioner have been frequently brought up by a writ of certiorari, showing that they are those of an inferior court, and if he has decided anything without jurisdiction that matter is open to collateral attack or to be litigated over again.

In Mayor of London v. Cox, 2 E. & I. App. 262, Wiles, J., said:

"Another distinction is that whereas the judgment of a superior court unreversed is conclusive as to all relevant matters thereby decided, the judgment of an inferior court involving a question of jurisdiction is not final. If the decision be for the defendant, there is nothing to estop the plaintiff from suing over again in a superior court, and insisting that the decision below had turned or might have turned upon jurisdiction."

I also refer to the case of Stewart v. Taylor, 31 N. S. R. 512.

In my opinion the appeal should be allowed with costs, and the lease should be granted with the description proposed by the appellants.

RUSSELL, J. The Dominion Coal Company had a license to search over a coal area which became a first right on January 26, 1906, before which time it was a second right. In July, 1907, while this license to search was in force, an application was made for a lease of one mile, the northern boundary of which was to be the northern boundary of the area covered by the license to search, the width being such as was required to make up the one mile area. Previously to 1893 Rev. John Murray held a license to search over an area lying to the north of the area covered by the license to search first mentioned, and it is common ground that the northern line of the Dominion Coal Company's area is the southern boundary of the area covered by Mr. Murray's license to search. On August 31, 1903, Mr. Murray applied for a lease, which was granted, according to a description which sets out the starting point and the several courses of the area, and closes with the words, "being an area of one square mile selected out of license to search held by me, containing one square mile, more or less, in manner and form as the said area is specified and delineated." The description also refers to a plan annexed, and the plan indicates a rectangular piece of land bounded southerly on the north line of the Dominion Coal Company's license to search, and forming part of a license to search held by T. C. Harold, which is the same area that is included in the license to search held by Mr. Murray, and already referred to.

When the matter of the Dominion Coal Company's application came before the Commissioner of Works and Mines, some question seems to have arisen as to the proper construction of the lease to Mr. Murray, which it is suggested would, if governed by the courses and distances, extend beyond the line plotted on the plan as the southern boundary of the license to search, and encroach upon the land represented on the plan as covered by the Dominion Coal Company's license to search, The commissioner did not settle this question, but merely said that "the lease issued to said John Murray was not to be considered to be

in any way void or uncertain." The applicants regarded this as a decision, and appealed, but this court decided that there had been no appealable decision on the application, and quashed the appeal. The applicants then applied to the commissioner to decide the question, when the deputy commissioner sent a letter to the company's solicitor purporting to express what he considered to be the effect of the prior decision. An appeal was taken from this, and was dismissed because the pronouncement was not a decision. A further effort was made to extract a decision, with the same result that followed the previous effort, and a mandamus was then issued to the commissioner of works and mines, Hon. Mr. Drysdale, who had succeeded to the office, to compel him to take up the case and decide it. The decision in favor of the applicant was appealed to the Supreme Court of Canada (36 N. S. R., 282; 34 S. C. C. 328). The court was unanimous in dismissing the appeal, and three of the five judges concurred in an opinion pronounced by Mr. Justice Killam, who expressed no opinion as to the correctness of the decisions of this court, or as to the merits of the inquiry before the Commissioner of Works and Mines. But Mr. Justice Davies discussed the validity of the decision of this court on the last of the three appeals from the commissioner of works, and also commented on the opinion of Mr. Justice Townshend on the application for mandamus. He did not agree with the view that a simple "yes" or "no" to the application was all that was required. There were legal questions as to the proper construction of Mr. Murray's lease on which he thought "the commissioner had no right to pass. What lands were legally covered by Murray's lease was a question to be determined afterwards by the court in a proper action. No decision of the commissioner could either contract or expand the legal boundaries of Murray's lease."

His lordship therefore suggested a form of description for the lease to the Dominion Coal Company for the purpose of leaving the question of the proper construction of Murray's lease open for decision by the court in a proper action, and the honorable commissioner of works, it is said by the applicant's counsel, adopted this suggestion. I am not sure that he did so, or intended to do so. The express purpose of the suggestion of Mr. Justice Davies was to leave the proper construction of the Murray lease an open question to be decided by the proper court. He meant that it should be open to the applicants to say that the Murray lease must be governed by the prior license to search, and not extend beyond it. The effect of the commissioner's finding is that it extends beyond the area covered by the license to search, and takes a part of the

land covered by the Coal Company's license. The conclusion of his decision is as follows:

"I find that a portion of the area selected and applied for by the coal company is already covered by the Murray lease; that a lease of any such portion cannot issue to the coal company; but a lease will go to the company of that portion selected in their application for lease which lies outside of the area described in said Murray lease."

I think this finding is opposed to the views of Mr. Justice Davies, and that the issue of a lease in accordance with the finding would defeat the purpose of the suggestion made by that learned judge, whose idea was that the lease should be so drawn as to leave the question open, to be decided in the proper action. The applicants are, however, content to take a lease in the terms of the decision: that is to say, a lease of that portion selected in their application for lease which lies outside of the area described in the Murray lease. This will leave them free to contend that the Murray lease does not extend beyond the boundary of his license to search. But the present commissioner of works and mines has made a decision that he will only grant a lease to the Dominion Coal Company, excepting from the portion that they have selected the part covered by the Murray lease, describing it by courses and distances in such a way as to cut out about half a mile of the area applied for by the Dominion Coal Company. The difference between this and what Mr. Justice Davies suggested is perfectly obvious. The question which he thought should be left open, namely, whether the courses and distances in so far as they include anything outside of Mr. Murray's license to search, were not *falsa demonstratio,* being controlled by the statement in the description that the lease was to consist of one square mile "selected out of the license to search," and by the requirement of the law that it must not include anything under license to search, as the lease so extended must have done; this question, which Mr. Justice Davies thought should be left open for decision in the proper action, will be closed against the applicants if they are granted a lease in the form now proposed by the commissioner. They will have no title on which to found any contention as to the proper construction of Mr. Murray's lease. I therefore must concur in the opinion of my learned brother Graham.

MEAGHER, J. On the 15th of April, 1905, the then commissioner of mines, now Mr. Justice Drysdale, a member of this court, upon a controversy between the parties to this proceeding, decided amongst other questions before him, the following:

1. That it was not open to the company (the present appellants) to question the lease to Murray (the present respondent) on the ground that it covered part of the area described in the license to search granted to the appellants of the 12th of October, 1904.

The reason the learned commissioner gave for that conclusion was because the license mentioned was subsequent in time to Murray's lease.

2. That the following contention by the company was not well-founded, viz., that when the lease to Murray was issued they held licenses to search applied for by one John White, under date of January 24, 1893, which were in force, and were held by the company at the time of the issue of the lease to Murray, and which latter covered part of the area described in such license.

The reasons for the decision in support of the last-mentioned conclusion by the learned commissioner were:

"(a) That the licenses relied on were allowed to expire without a selection being made under them, and without any application for a lease based thereon, and therefore it was not competent for the company to object to Murray's lease;

(b) That the company's application being subsequent in time to the lease, they were not entitled to urge that objection, even assuming the lease covered part of such area;

(c) That the company's right to a lease must stand upon the license under which it was made, it being an attempted selection of a square mile under their license applied for October 12, 1894; and,

(d) That a portion of the area selected and applied for by the company was already covered by the Murray lease, and a lease of such portion could not issue to the (appellant) company; but that a lease would issue of that portion selected by their application for a lease, lying outside of the area described in Murray's lease."

An appeal was not taken from that decision. It is therefore conclusive as to all questions of law and fact involved in the controversy between the parties upon which it was pronounced.

In March, 1902, the same commissioner gave a decision upon the appellant's application in 1897 for a lease, refusing to entertain it upon the ground that his predecessor in office had refused it, and therefore it was not open to him to deal with it. The appellants thereupon brought an action against the commissioner for a mandamus, which resulted in its being awarded, and in pursuance thereof the commissioner entertained the application, and pronounced the decision, the substance of which I have given first.

The final decision in the action for a mandamus is reported in 34 S. C. R. 328. It proceeded upon the ground that the commissioner's view of the previous decision was an erroneous one.

The present appeal is from a decision of the Honorable Mr. Pipes, Commissioner of Mines, etc. (now the Attorney General of the Province), dated March 28, 1906. intended to carry into effect the decision of his predecessor above summarized.

The commissioner, from whose decision the present appeal was asserted, did not possess the power of reviewing or varying the decision

he was called upon to give effect to; being a mere statutory officer he does not possess any power which the statute does not expressly or by necessary implication confer upon him. The power to review is certainly not expressly given, and I have been unable to find anything in the statute which affords a suggestion for its existence. I mention this because a somewhat lengthy discussion took place on the argument upon that subject. It arose, however, from an observation made by a member of the court.

All that remained for the succeeding commissioner to do, in view of what had been decided by his predecessor, was to settle the description to be embodied in the lease to the appellants, and in doing that to be careful not to ignore or contravene the terms or effect of his predecessor's decision. It was also incumbent upon him, in determining the form and limits of the description for the appellants' lease, to see that it did not encroach upon the limits within that of the respondent, and of the validity of which latter there could not then be any question or doubt, so far as the commissioner was concerned. After framing the description so as to guard against encroachment upon the area covered by the respondent's lease, his next duty was to see that in all other respects it conformed to the appellants' application, and gave them all their application, properly construed, covered.

Reverting for a moment to the question of reversing or varying Commissioner Drysdale's decision. I may add that there cannot be found in the proceedings before the commissioner (Pipes) a suggestion even of a request or a contention that he should or could review or disregard any of the conclusions embodied in the decision to which he was required to give effect; or was empowered to ignore its effect upon the proceeding before him.

The course taken before Commissioner Pipes plainly indicates that the mere form of the description for the appellants' lease was all that was sought or desired at his hands. It was the only matter discussed, and that of course meant, and could only mean, that it was to be done in the light of the earlier decision, and subject to all its conclusions.

The appeal now before this court is limited in name and terms to the decision of Commissioner Pipes, as of course it must be in scope and effect. The time has long gone by for an appeal from the decision which preceded it.

It will be convenient to mention a few dates. Murray's lease is dated October 5, 1893, and runs from the date of his application therefor, viz., August 31, 1893; his application for a license (second right) to search is dated December 9, 1890. The description in his application for the lease is the same as that in the lease itself.

The appellants' rights must, under the earlier decision, and the facts as well, depend upon their application of October 12, 1894, and which, by reference, applies thereto the description in the application under date of July 25, 1894.

The validity or scope or effect of the respondent's lease other than in the matter of the description in it, in respect to extent and location, be it correct or otherwise, cannot be inquired into upon this appeal, for the reason that this court is merely exercising an appellate jurisdiction under the Mines Act, and not its original or inherent jurisdiction. Until attacked by a proceeding originating in this court, its validity cannot be questioned; certainly not by any course the commissioner might take upon a controversy such as that which gave rise to the present appeal.

When the appellants, in January, 1906, applied to the commissioner, under the decision of Commissioner Drysdale, for their lease, they submitted a description in the form they desired it, thus showing their conception of the situation to be as I have stated, viz., that it was merely a proceeding to give effect to the decision just mentioned.

The description so submitted was filed of record in the commissioner's office, and he was moved by both parties to determine its form and limits accordingly.

The commissioner, for valid and sufficient reasons, I assume, subsequently ordered a survey of the *locus* to be made by an officer of his department, and one was accordingly made. The course thus taken does not appear to have been objected to at any stage of the proceedings by any of the parties. It was, however, mildly suggested during the argument before us, that it was scarcely a regular proceeding.

Both parties were notified of the time of the survey, and both were represented at it. It appears to have been on the part of the commissioner a merely advisory proceeding, intended to aid him and the parties too, I assume, in applying those of the descriptions which called for examination; and therefore in itself did not settle the facts. It was not binding upon the commissioner—I mean in the sense of controlling his conclusions upon the facts necessary to be determined by him. It afforded him material, however, for a better understanding of the questions he had to decide than the mere descriptions themselves did.

The survey affords evidence of having been carefully and scientifically made after examination of the ground and everything else which bore upon the situation, including the various applications and descriptions relating to the areas claimed and in controversy, as well as others adjoining or near them.

According to the description fixed by the commissioner, which practically, if not literally, followed the report of the surveyor, it begins

at an iron post in the southern boundary of Murray's leased area, and lies on the southern side and western end of that area. So that wherever Murray's leased plot is, the appellants' area abuts on its southern side and western end. It certainly could not, as I have already pointed out, be permitted to encroach upon it.

If any dispute should arise as to the precise location of the respondent's lease upon the ground, or the true construction of the description in it, it can, I suppose, be settled hereafter by a suit in this court to determine and declare the respective rights of the present litigants under their respective leases. At present the appellants have no title—I mean no formal title, sufficient to enable them to bring a suit in the aspect mentioned upon it against the respondent successfully.

Whatever right or necessity may exist for seeking the aid of the general powers of this court to determine any dispute between these litigants which may arise in respect to this area, or their rights therein (as to which I am not called upon to express an opinion), I am unable to discover any valid reason for doubting that the commissioner was entitled to exercise the jurisdiction the statute gave him, and which both parties invoked, and thus determine the description in dispute; and to that end, if there was uncertainty or ambiguity, or indefiniteness in the material from which he was required to determine such description, to direct, as he did, a survey by a sworn officer of his department.

To settle and adjust the description so as on the one hand to give the appellants the full benefit of their description, as far as was just and reasonably practicable, and on the other, to avoid encroachment upon the area covered by the respondent's lease, was one of the statutory duties imposed upon the commissioner; to him alone that task, where controversy exists between parties in respect to applications for territory under the Mines Act, has been specially committed by the legislature. No title can formally pass under the statute to the appellants until the commissioner determines the description the grant shall contain, and this court cannot take the matter out of his hands and determine it. Of course, if he refused to proceed, it would compel him, as it compelled his predecessor, by mandamus to hear and adjudicate upon it. At page 336 of the report cited, Killam, J., said, referring to the commissioner:

"It was imperative upon him to exercise the jurisdiction when called upon to do so by a party interested and having the right to make the application. Rex v. Havering Atte Bower, 5 B. & Ald., 691; Macdougall v. Paterson, 11 C. B. 755, and Julius v. The Lord Bishop of Oxford, 5 A. C. 214."

So far as my memory and my notes of the argument enable me to speak, the question of want of jurisdiction on the part of the commis-

sioner, discussed by my learned brother Graham, was not raised upon the argument except by my learned brother himself. Apart from that, and in view of the powers and duties of the commissioner, I do not well see how it could have been successfully urged.

When the commissioner has before him rival applications upon which, in the performance of his statutory duties, he has to pronounce, he must, of course, pass upon every question, be it fact or law (including the construction of the descriptions in the applications relevant to the inquiry before him, and their application in respect to monuments, courses and distances, and whether they involve questions coming under the term *falsa demonstratio,* or not) which arises in the controversy, and necessary to be determined upon the inquiry. In dealing with the controversy before him the commissioner, of necessity, had to regard the terms of the description contained in the respondent's lease, and had to settle its meaning and extent as well as its location upon the ground, so far as was necessary to enable him to apply and settle the appellants' description. If it were otherwise, the moment he encountered a legal question he would be forced to decline jurisdiction. In such a case, if mandamus would not lie to compel him to proceed and determine the controversy, this court would have to take up the matter at the point where he left off, and thus assume the jurisdiction which the statute specially, and I think exclusively, in the first instance, conferred upon the commissioner. But if it is true that he is not vested with the power of determining legal questions such as those adverted to, then of course mandamus would not lie to compel him to hear and determine them.

The intention of the Mines Act is that, subject to the general jurisdiction of this court in respect to conflicting titles and rights under them, and to the appellate and other powers given to it by that enactment, the granting of titles under its provision is vested in the crown, to be exercised by the commissioner of mines as its representative, and not by this court.

It is true that the commissioner could not, by any decision of his, contract, vary, or expand the proper boundaries of Murray's lease. Both he and the crown, except where otherwise specially authorized by the statute, were *functus* as to it; but surely that fact did not deprive the commissioner of the power, in deciding upon the area which the crown might lawfully grant under the appellant's application, to examine the description in the Murray lease, and say where, as a matter of law and fact, its true location was, so as to enable him to avoid, in the description he was about to settle, encroaching upon Murray's leased area, and yet give the appellants all the area their application called for, so far as was legally practicable.

If the description of the grant made under the latter invaded the respondent's title, this court clearly possesses jurisdiction to protect the latter's rights against the title so attempted to be conferred. In such and similar cases, as well as in cases of forfeiture under the statute, and for nonperformance of the conditions called for, no one will question the jurisdiction of this court to interfere and adjust and determine the rights involved, and redress wrongs occasioned to holders of titles. For the purposes of this decision it is not necessary to say more than that the jurisdiction of the court does not arise when, nor merely because, difficult legal questions may confront the commissioner when dealing with applications, under the Mines Act before him, which may be more or less conflicting; nor does his jurisdiction cease in such a contingency. If the intention of the statute was that he should stay his hand upon any serious legal difficulty arising, one would naturally expect a provision giving jurisdiction to some legal tribunal over the matter, in substitution for the commissioner; but no such provision exists. It was a purely legal question the commissioner encountered in 1902 when he refused to entertain the appellants' application; nevertheless, the court compelled him to hear and determine the controversy.

As to Lockhart v. Mott, this court sought to invest the commissioner with a power not merely to determine priority of applications, but to clothe him with equitable jurisdiction to adjudicate upon questions of good faith, fraud, and over-reaching; and thus, perhaps, destroy the priority which the statute expressly gave the first applicant. Moreover, this court, though perhaps not in terms, yet in effect, assumed that the statutory appeal from the commissioner brought into operation its original as well as its appellate powers, under the Mines Act. The decision of the privy council fortunately put an end to both theories. It may be correct to say (but I do not so hold at present) that this court, on a proper case, could restrain parties from making or urging upon the commissioner, applications for titles under the statute; but if so, this case does not possess any element warranting its interference with the commissioner, who, under the statute, is not only entitled, but is obliged to investigate and pass upon all questions necessary to determine the controversy without any direction from this court or any interference or control over him by it. The court has never done so, and I am not aware of any instance where it was invited to do so. Leases and other titles, it is true, have been attacked, and so also have forfeitures and titles founded upon adjudications by the commissioner of the forfeiture of prior titles been impeached and set aside by suits in this court; but none of the litigation referred to, so far as I am aware, has gone as far as what is suggested might be done in this case.

It is suggested that the surveyor, McKenzie, C. E., adopted the theory of the deputy commissioner, viz., that the Murray lease was properly laid off upon the ground. This is said, I suppose, to impair the correctness of his work. There is no proof that I can perceive to sustain that view. On the contrary he seems to have made a full and complete survey.

The presence at the survey of Mr. C. M. O'Dell, C. E., a man of very considerable eminence in his profession, representing the appellants, ought to be a sufficient assurance that the survey was a full and complete one, and accurately made, and that assurance is strengthened by the fact that neither before the commissioner nor before this court, so far as I remember, was any attack made upon that survey, or the method pursued in making it. Mr. O'Dell was familiar with the ground and the descriptions long before that survey, and had himself surveyed at least a portion of it, if not the whole, and had made a plan of it.

I am unable to conclude that there is error in the decision under review, and therefore the appeal should, in my opinion fail.

UNITED STATES v. MUNDAY et al.

[Circuit Court W. D. Washington, N. D., April 6, 1911.]

186 Fed. 375.

1. Crimes—Federal Law.

The only crimes punishable under federal law are those defined by the laws enacted by congress.

2. Conspiracy—Federal Law.

The elements of the crime of conspiracy under United States laws are (1) an object which must be the commission of an offense against the United States to defraud the United States; (2) a plan of accomplishment; (3) an agreement for co-operation; (4) an overt act by a conspirator to effect the object of the conspiracy.

3. Coal Lands—Alaska—Federal Statutes.

The restrictions of section 2350 of United States Revised Statutes relating to entries upon coal lands held not to be imported into the Act of April 28, 1904, relating to coal lands in Alaska, the latter act being subsequent and therefore paramount to the former.

4. Same—Right to Sell before Patent Issued.

A locator of coal lands in Alaska has the right to sell or mortgage his claims before obtaining a patent and his vendee if a citizen of the United States or a group of citizens may receive the patent.

5. Same—Entries—Dummies.

In land office practice dummies are either fictitious persons or those having no interest who permit the use of their names for the perpetration of a fraud and sign papers and make affidavits perfunctorily.

6. Same.

One who opens or improves a coal mine in Alaska, locates a claim, marks its lines and corners, and posts and records a notice in accordance with the statute, and subsequently sells or mortgages the same, is not a dummy entry man.

7. Same—Foreign Corporations.

A foreign corporation can not lawfully acquire or hold a coal claim in Alaska either in its corporate name or in the name of an agent or trustee.

Criminal prosecution of Charles F. Munday, Archie W. Shiels and Earl E. Siegley by indictment charging conspiracy to fraudulently acquire coal lands in Alaska. Indictment quashed.

NOTE.

Overt Act as Essential to Conspiracy.

Conspiracy at common law is defined as a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal by criminal or unlawful means. Pettibone v. U. S., 148 U. S. 197, 37 L. Ed. 419; Spies v. People, 122 Ill. 1, 6 Am. Crim. Rep. 570, 6 Notes Ill. Rep., p. 131, par. 5; McClain, Crim. Law, § 953.

At common law the crime is completed when the conspiracy is entered into without the commission of any act in furtherance of the object. U. S. v. Hirsch, 100 U. S. 33, 25 L. Ed. 539; Bannon v. U. S., 156 U. S. 464, 39 L. Ed. 494, 9 Am. Crim. Rep. 338; Arthur v. Oakes, 11 C. C. A. 209, 63 Fed. 310, 9 Am. Crim. Rep. 184; Landingham v.

B. D. Townsend and S. R. Rush, State Assistant Attorney General.

For defendant Munday—Blaine, Tucker & Hyland and Walter S. Fulton.

For defendant Seigley—Kerr & McCord.

For defendant Shiels—Dorr & Hadley.

For defendants—E. C. Hughes.

HANFORD, District Judge. The government prosecutes the defendants by an indictment founded upon section 5440 of the Revised Statutes of the United States, charging them as criminal conspirators. A jury having been impaneled and sworn to try the case, counsel for the government made an opening statement, giving an outline of the facts which the government relies upon to sustain the charge. His statement, however, consisted of a mere reading of the indictment. After a witness had been called and sworn to testify, counsel for the defendants interposed an objection to the introduction of any evidence, on the ground, as they allege, that the indictment is insufficient to support a judgment adverse to their clients, and by argument supporting their objection they have presented the concrete question whether the conspiracy charged is criminal or innocent. In the consideration and decision of the question submitted, it will be assumed that the indictment is a fair and complete statement of the government's case; that is to say, it specifies the crime intended to be charged with definiteness and certainty, and contains a general outline of the chain of circumstances and the facts which the evidence to be offered will prove, or tend to prove.

Elements of Criminal Conspiracy.

The only crimes punishable under federal law are those defined by the laws enacted by congress. Therefore it must be kept in mind that the prosecution in this case is for an alleged statutory crime. The

State, 49 Ind. 186, 1 Am. Crim. Rep. 105; Commonwealth v. Warren, 6 Mass. 74.

By statute in several states and by section 5440, United States Revised Statutes, it is expressly required that an overt act shall have been committed in pursuance of the conspiracy in order to complete the offense.

The language of the section is: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable," etc. Hyde v. Shine, 199 U. S. 62, 50 L. Ed. 90; Diamond v. Shine, 199 U. S. 88, 50 L. Ed. 99; U. S. v. Reichert, 32 Fed. 142; U. S. v. Milner, 36 Fed. 890.

elements of the crime of conspiracy under the laws of the United States are: (1) An object to be accomplished which must be (a) the commission of an offense against the United States; (b) to defraud the United States. (2) A plan or scheme embodying means to accomplish the object. (3) An agreement or understanding between two or more persons whereby they become definitely committed to co-operate for the accomplishment of the object by the means embodied in the scheme, or by any effectual means. (4) An overt act by one or more of the conspirators to effect the object of the conspiracy.

The Indictment Analyzed.

The indictment names the three defendants on trial and one Algernon H. Stracey as the persons implicated in the conspiracy charged. King County, in the State of Washington, and the 1st day of May, 1905, are specified as the place and time of the formation of the alleged criminal combination.

The general charge of the indictment is that the four persons named, with divers other unknown persons, did unlawfully (omitting other adjectives) combine, confederate, and agree together to defraud the United States of America of the use and possession of, and title to, large tracts of valuable coal lands then and there part of the public domain of the United States, situated within the Kayak recording district of Alaska, being contiguous tracts and parcels of coal lands collectively and commonly known as the "Stracey group." The indictment specifies that the lands referred to were subject to location and entry under the coal land laws of the United States applicable to Alaska and subject to the several attempted locations and entries in a subsequent part of the indictment specified, except for the unlawful, fraudulent, false, feigned, and fictitious character of said attempted locations and entries; and that the value of said lands is $10,000,000.

The indictment contains other specifications of the nature of the intended fraud, some of which, however, are comprehended within the general charge of the purpose to defraud the United States by

But even under section 5440 the combination is the gist of the offense. U. S. v. Hirsch, 100 U. S. 33, 25 L. Ed. 539; Pettibone v. U. S., 148 U. S. 197, 37 L. Ed. 419. Proof of a single overt act is sufficient and several overt acts will not constitute more than one offense where they are done under a single combination. U. S. v. Howell, 56 Fed. 21; U. S. v. Cassidy, 67 Fed. 698; U. S. v. Debs, 65 Fed. 210; McClain, Crim. Law, § 966.

An overt act need not be proved against every member of the conspiracy, or a distinct act connecting him with the combination be alleged. Bannon v. U. S., 156 U. S. 464, 39 L. Ed. 494, 9 Am. Crim. Rep. 338.

If the conspiracy be entered into within the limits of the United States

devesting the government of its title to, and proprietary rights in, the coal lands designated, and therefore do not merit additional mention. Other specifications of fraud are to the effect that the scheme included interference with the administration of the land business of the United States by deceiving the officers and agents of the government, in order to induce them to approve the several locations and entries and issue patents conveying the title to the coal lands designated.

The gravamen of the charge is an unlawful conspiracy to obtain coal land in Alaska for the Alaska Development Company, a corporation of the State of Washington, and the Pacific Coal & Oil Company, reputed to be a corporation organized and existing under the legal authority of some foreign government, to wit, the Dominion of Canada or one of its provinces; the quantity of land so to be obtained for said corporations being in excess of the quantity which the law permits. The several tracts of coal land to be acquired pursuant to the alleged conspiracy are forty in number, each being specifically described and identified as a coal claim bearing the name of the individual locator and claimant thereof and by a serial number and by the area thereof expressed in acres and fractions of an acre; each claim being approximately one-fourth of a section.

The plan or scheme embodying the means whereby the object of the alleged conspiracy was to be accomplished are set forth with particularity in articulated paragraphs which I have epitomized as follows: The objects and purposes of said unlawful conspiracy were to be furthered and effected by means of unlawful, fraudulent, false, feigned, and fictitious locations, notices of locations, preferential rights to purchase, applications to enter and purchase, and final entries and purchases under the coal land laws of the United States; by cunning persuasion and promises of pecuniary reward and other corrupt means persons severally qualified by law (except as stated) should be procured and induced to make the fictitious locations and fraudulent entries of said tracts of coal lands ostensibly for the exclusive use and benefit of themselves, respectively, but in truth and in fact for the use and benefit of the Alaska Development Company and the Pacific Coal & Oil Company. The possession of all of said coal lands was to be held and the use thereof

and within the jurisdiction of the court, the crime is complete, and the subsequent overt act may be done anywhere. Dealy v. U. S., 152 U. S. 539, 38 L. Ed. 545, 9 Am. Crim. Rep. 161.

The provision for an overt act merely affords a *locus penitentiae* giving opportunity to one or all of the parties to abandon their design and thus avoid the penalty prescribed by statute. U. S. v. Britton, 108 U. S. 199, 27 L. Ed. 698; Bannon v. U. S., 156 U. S. 464, 39 L. Ed. 494, 9 Am. Crim. Rep. 338; Dealy v. U. S., 152 U. S. 539, 38 L. Ed. 545, 9 Am. Crim. Rep. 161.

enjoyed by persons ostensibly as the agents of and for the benefit of the individual claimants, respectively, but in truth and in fact as the agent of, and for the use and benefit of, said corporations. Each claimant should be induced, persuaded, and procured to support his unlawful location and fraudulent entry by affidavits regular in form but containing false representations; that each of them, respectively, had opened and improved a coal mine and expended moneys in that behalf and staked out and located a coal claim, including within its boundaries said coal mines, and had taken and held possession of said coal claims and intended to purchase from the United States under and pursuant to the coal land law applicable to Alaska the tract of land so pretended to have been located. By said means, the officers of the United States having charge of public land matters should be deceived and induced to accept, file, and record notices of location and affidavits in the land office, and to segregate said coal lands from the public domain, and withdraw the same from public entry under any of the public land laws of the United States, and rights should thereby be acquired ostensibly for the benefit of the persons making such false affidavits, but, in fact, for the said corporations. Thereafter said coal land claimants, respectively, should hold and exercise their pretended and unlawful preferential rights to purchase said coal lands ostensibly for their own use and benefit, but in fact for the said two corporations. Thereafter said claimants should, in the form and manner provided by law, make applications to enter and purchase said coal lands ostensibly for their own use and benefit, but, in fact, for the said two corporations, and thereby the said corporations should receive and enjoy the benefits of a greater number of locations and entries of coal lands, and for a greater quantity of coal lands than allowed by law. The respective shares and interests of said Alaska Development Company and of said Pacific Coal & Oil Company in the fruits and benefits of the unlawful conspiracy were to be adjusted so that said Alaska Development Company should receive and enjoy the title, use, and value of all of said coal lands subject to a contract entered into between said two corporations prior to the transactions, and which was in full force and effect at and during all of the times mentioned, by which it was provided that, as between said corporations, the Pacific Coal & Oil Company should be entitled to take and hold possession of said coal lands, operate the mines thereon, and extract the coal therefrom, paying a royalty therefor to said Alaska Development Company, and have an option to purchase all of said coal lands within certain stated times and for certain stated prices.

Overt acts are charged, substantially, as follows: That after the formation of said unlawful conspiracy, and in pursuance of, and to effect

its object, Archie W. Shiels, one of the defendants, did unlawfully on specified dates cause each of the said coal claims to be surveyed by a mineral surveyor of the United States. Said survey being intended for use in applications to enter and purchase the said coal claims by the respective claimants thereof, and thereafter in further pursuance of, and to effect the object of said unlawful conspiracy, the said Shiels did knowingly on specified dates file and cause to be filed in the office of the Surveyor General of the United States for Alaska each and all of the said official surveys and the field notes thereof. The indictment then sets forth in tabulated form a list of the claims surveyed, with the dates on which the surveys were made and the filing dates, said claims being forty in number and identified by the names of the claimants as the same claims previously mentioned. The indictment then alleges a number of other overt acts in furtherance of and to consummate the conspiracy, indicating that the scheme was carried out to the extent of filing application to purchase said claims by each of the locators and payment of the government's price to the officers of the local land office for the district of Alaska in which the lands are situated, and that in the transaction of said business the defendants or one of them acted as attorney or agent for all of the locators. The indictment alleges other transactions subsequent to the 1st day of January, 1910, including written communications referring to money advanced by the Pacific Coal & Oil Company for which security was to be taken in the form of mortgages to be executed by the several entry men and payments of money to the receiver of the land office at Juneau in payment of the government price for a number of said coal claims. Finally, the indictment charges that on a specified date subsequent to January 1, 1910, one of the defendants paid to the receiver of the land office at Juneau the government price for thirty-eight of said coal claims.

It is to be specially noted that the indictment does not charge that the several locators were dummies; on the contrary, it is expressly averred that they were each of them competent to make entries of coal lands in Alaska, and not disqualified except for particular reasons in the indictment specified, and it is not charged as one of those particular reasons that their locations were illegal because of any failure to do the things which the law makes essential to the acquisition of rights as locators of coal land, nor that more than one coal right was to be, or had been, exercised by any one locator. To avoid possible complications from the enactment of the Criminal Code which went into effect on the 1st day of January, 1910, counsel for the government voluntarily announced an abandonment by the government of the charges contained in the indictment of overt acts subsequent to that date as elements of the crime with which the defendants are charged.

Provisions of the Statute Affecting Coal Claims in Alaska.

For convenience of reference, I will use Pierce's Federal Code, being a compilation of all the statutes of the United States of a general and permanent nature in force March 4, 1907, with a supplement continuing the compilation to January 1, 1910. In this volume the coal land laws of the United States necessary to be considered in the determination of the question—whether the defendants intended or attempted to perpetrate a fraud—are set forth in a group in sections numbered consecutively from 10,044 to 10,054, inclusive; the same being an accurate reprint of the laws comprised in sections 2347 to 2352 of the Revised Statutes of the United States (U. S. Comp. St. 1901, pp. 1440, 1441), and in 31 U. S. Stat. at L. p. 658 (U. S. Comp. St. 1901, p. 1441), and in 33 U. S. Stat. at L. p. 525 (U. S. Comp. St. Supp. 1909, p. 556). Sections 10044 to 10049, inclusive, being identical with sections 2347 to 2352, inclusive, of the Revised Statutes, comprise the general coal land law of the United States enacted by Congress in the year 1873. Referring to the sections by the Code numbers, the statutes contain the following provisions:

Section 10,044 prescribes a rule for the acquisition from the government of coal lands being part of the public domain of the United States, by cash entry. By said rule the right to make entries is limited to persons and associations whose qualifications are defined in the following words:

"Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above."

And the maximum quantity of coal land which may be entered by a single individual or an association is fixed, and the minimum price to be paid therefor is also fixed.

Section 10,045 provides for a preference right of entry in favor of any person or association of persons severally qualified as provided in the preceding section who have opened and improved or shall open and improve any coal mine or mines on the public lands and shall be in actual possession of the same, and further provides that, when any association not less than four persons severally qualified as above shall have expended not less than $5,000 in working and improving any such mine or mines, such association may enter not exceeding 640 acres, including such mining improvements.

Section 10,046 relates to the presentation of claims for preferential rights and details of procedure to secure the same.

Section 10,047 reads as follows:

"The three preceding sections shall be held to authorize only one

entry by the same person or association of persons; and no association of persons any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions; and all persons claiming under section twenty-three hundred and forty-eight shall be required to prove their respective rights and pay for the lands filed upon within one year from the time prescribed for filing their respective claims; and upon failure to file the proper notice, or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant."

Section 10,048 relates to conflicting claims upon coal lands on which improvements shall have been commenced.

Section 10,049 is a saving clause of rights which may have attached prior to the enactment of the law.

Section 10,050 is the Act of Congress approved June 6, 1900 (31 Stat. 658), extending to the district of Alaska so much of the public land laws of the United States as relate to coal lands, namely, sections 2347 to 2352, inclusive, of the Revised Statutes.

Sections 10,051-10,054, inclusive, comprise the Act of Congress approved April 28, 1904 (33 Stat. 525), entitled, "An act to amend an act entitled 'An act to extend the coal land laws to the district of Alaska,' approved June sixth, nineteen hundred," which reads as follows:

"10,051. That any person or association of persons qualified to make entry under the coal land laws of the United States, who shall have opened or improved a coal mine or coal mines on any of the unsurveyed public lands of the United States in the district of Alaska, may locate the lands upon which such mine or mines are situated, in rectangular tracts containing forty, eighty, or one hundred and sixty acres with north and south boundary lines run according to the true meridian, by marking the four corners thereof with permanent monuments, so that the boundaries thereof may be readily and easily traced. And all such locators shall, within one year from the passage of this Act, or within one year from making such location, file for record in the recording district, and with the register and receiver of the land district in which the lands are located, or situated, a notice containing the name or names of the locator or locators, the date of the location, the description of the lands located, and a reference to such natural objects or permanent monuments as will readily identify the same.

"10,052. Sec. 2. That such locator or locators, or their assigns, who are citizens of the United States, shall receive a patent to the lands located by presenting, at any time within three years from the date of such notice, to the register and receiver of the land district in which the lands so located are situated an application therefor, accompanied by a certified copy of a plat of survey and field notes thereof, made by a United States deputy surveyor or a United States mineral surveyor

duly approved by the Surveyor General for the district of Alaska, and a payment of the sum of ten dollars per acre for the lands applied for; but no such application shall be allowed until after the applicant has caused a notice of the presentation thereof, embracing a description of the lands, to have been published in a newspaper in the district of Alaska published nearest the location of the premises for a period of sixty days, and shall have caused copies of such notice, together with a certified copy of the official plat or survey, to have been kept posted in a conspicuous place upon the land applied for and in the land office for the district in which the lands are located for a like period, and until after he shall have furnished proof of such publication and posting, and such other proof as is required by the coal-land laws: Provided, that nothing herein contained shall be so construed as to authorize entries to be made or title to be acquired to the shore of any navigable waters within said district.

"10,053. Sec. 3. That during such period of posting and publication, or within six months thereafter, any person or association of persons having or asserting any adverse interest or claim to the tract of land or any part thereof sought to be purchased shall file in the land office where such application is pending, under oath, an adverse claim, setting forth the nature and extent thereof, and such adverse claimant shall, within sixty days after the filing of such adverse claim, begin an action to quiet title in a court of competent jurisdiction within the district of Alaska, and thereafter no patent shall issue for such claim until the final adjudication of the rights of the parties, and such patent shall then be issued in conformity with the final decree of such court therein.

"10,054. Sec. 4. That all the provisions of the coal land laws of the United States not in conflict with the provisions of this act shall continue and be in full force in the district of Alaska."

The statute comprised in these four quoted section is specially applicable to Alaska, and was enacted by congress to meet an urgent demand, amounting to necessity and because the previous statute of June 6, 1900, extending the general coal land law of the United States to Alaska, was impracticable because conditions made it impossible to acquire any rights under it by compliance with its requirements.

In a letter addressed to the registers and receivers in the district of Alaska, dated June 27, 1900, the Commissioner of the General Land Office announced the enactment of this law, and explained that under sections 2347 to 2352, inclusive, of the Revised Statutes, which the act purported to extend to Alaska, coal land filings and entries must be by legal subdivisions as made by the regular United States survey, and that under section 2401 of the Revised Statutes as amended by the Act of August 20, 1894 (U. S. Comp. St. 1901, p. 1477), no application for a special survey shall be granted unless the township proposed to be surveyed is within the range of the regular progress of the public surveys embraced by existing standard lines or bases for township and subdivisional surveys, and that, as no township or subdivisional sur-

veys have been made nor any standard lines or bases for township and subdivisional surveys established within Alaska, therefore until the filing in the local land office of the official plat of survey of a township, no coal filing nor entry can be made. This was, in fact, an official declaration of the attempt and failure of congress to make provision, by a practicable law, for the acquisition by individuals and associations of rights in and to coal lands in Alaska.

Instead of attempting to state the provisions of the law of 1904 in different phraseology, I have quoted it because it is the opinion of the court that it is not in any particular ambiguous. It means what the words selected by congress express according to the common and general understanding of people accustomed to use the English language. It need not be construed, and there is no authority to interpolate into its provisions restrictions and limitations of rights which it grants by judicial interpretation or construction. In the case of Newhall v. Sanger, 92 U. S. 765, 23 L. Ed. 769, Mr. Justice Davis said: "There is no authority to import a word into a statute in order to change its meaning."

By the arguments made it appears that this prosecution is founded in part at least upon a theory that the restrictions of section 10,047, above quoted, are to be deemed as being imported into the law of 1904. That contention is untenable, for the reason that by the express words of that section which I have quoted those restrictions apply only to persons and associations claiming or exercising rights under the three preceding sections, which were and are inapplicable to conditions in Alaska and never did have potential force there. The statute of 1904, applicable only to Alaska, is a declaration of the will of congress subsequent to the Act of June 6, 1900, extending the law of 1873 to Alaska, and therefore is the paramount law. The later law does not in words nor by reference to, and adoption of, the provisions of the older law, restrict persons or associations to a single exercise of the right granted to locate coal claims and secure patents therefor. The argument that section 10,047 must be read into the Alaska statute is that the right to locate is given only to persons and associations qualified to make entry under the coal land laws of the United States, and that these words exclude persons and associations having the qualifications prescribed, but disqualified by reason of having once exercised the right. By this argument there is interpolated into the statute words additional to and expressing a meaning different from the plain declaration of the law itself. The prescribed qualifications are age and citizenship. By the law of 1873 a person twenty-one years of age, a citizen of the United States is qualified to make an entry of coal land, and having the same qualifications, and having also

opened or improved a coal mine or unsurveyed public land in Alaska, he is entitled to become a locator of a coal claim, including the mine which he has opened or improved. This is so according to the letter of the law. And, having located a coal claim, he may sell it, and his vendee, if a citizen of the United States or an association composed of citizens, are entitled to receive a patent conveying the complete title from the government by compliance with the requirements of section 10,052. To say that a vendee of a qualified locator to be entitled to receive a patent must be a citizen or association of citizens qualified as prescribed to make an entry of coal land, and not disqualified by having exercised a right to acquire coal land from the government, infringes legislative power, for in the guise of construction a radical change in the law would be effected by the addition of requirements and restrictions which the lawmaking power did not put there. The words of the law are:

"That such locator or locators, *or their assigns, who are citizens of the United States,* shall receive a patent to the lands located by presenting * * *"

By having made *citizenship* a requisite condition of the right to receive a patent, the law makes *citizenship* the only requisite condition to the right. This is so by the rule declared by the Supreme Court in the words of Mr. Justice Davis above quoted, which is a fundamental rule for the construction and interpretation of statutes. *Expressum facit cessare tacitum.*

Congress intended to enact a practicable, workable law, and, if its second attempt to do so be not made futile by misconstruction, we have such a law. It is not a law made to serve the purpose of monopolists who would keep the coal of Alaska locked within her mountain walls, nor is it based upon any fantastic notion that trusts can be annihilated by giving coal rights to no one except the man who by personal toil may dig the coal and carry it to market upon his back or upon his head. It is the duty of the court to not misconstrue the law, nor stigmatize the congress which enacted it and the president who approved and signed it, by imputing to them a lack of either sense or honesty. This law by its words and intendment limits the rights of a qualified locator who has opened or improved a coal mine in Alaska by prescribing the maximum area and the form of the tract which he may secure by doing the things which the law exacts, and by making the opening or improving of a coal mine the initiatory step, and the marking of boundaries and corners and the posting and recording of notices essential to a valid location. These requirements necessitate expense and trouble, and it is not for the court to say that as restrictions and limitations they are not sufficient. The responsibility of determining all such questions belongs to the legislative branch of the government. To become entitled to a patent,

the locator or his assigns must publish and keep posted the notice prescribed by the second section of the act and furnish proof of such publication and posting, "and such other proof as is required by the coal land laws." We now look to the coal land laws to find what other proof must be furnished. We search the law to find what other proofs are required rather than regulations promulgated by departmental officers, because the words of the act refer to the law, and do not leave the locator, who has opened and improved a coal mine, under the necessity of complying with the personal will of bureau officers authorized to change the regulation as often as they may think that they discover reasons for more exacting conditions. Section 10,047 of the Code contains this clause:

"All persons claiming under section twenty-three hundred and forty-eight shall be required to *prove their respective rights* and pay for lands filed upon. * * *"

This is undoubtedly the other proof referred to, and by the selection and adoption of that particular clause there is plainly manifested a definite purpose to not graft the other provisions of the same section upon the Alaska coal land laws. Locators of coal claims in Alaska under this law have the right to use business sense, to look ahead and make arrangements for working capital and to contract in advance for transportation facilities, and to sell or mortgage their claims. By mandatory words the law prescribes that the locator who meets the requirements prescribed shall receive a patent. He may sell his claim before obtaining the patent, and, if he does so, his vendee, if a citizen of the United States or an association of citizens, shall receive the patent. It is not to be inferred that the law will permit the acquisition of coal lands in Alaska through the medium of dummy entry men. In land office practice dummies are either fictitious persons, or those who, having no interest in the transaction, permit the use of their names for the perpetration of a fraud and sign papers and make affidavits perfunctorily. A man who opens or improves a coal mine in Alaska and locates a claim in the form prescribed by the statute, including his improvements, and marks its lines and corners so that its boundaries can be readily traced on the ground, and posts and records a notice in conformity to the requirements of the statute, and is then competent and entitled to deal with the claim as his own property, to sell it, lease it, mortgage it, or keep it, and derive for himself all the profits and benefits to be derived from the most advantageous use or disposition of such property, is not a dummy entry man.

This understanding of the law does not make it inconsistent with its title. It is an amendatory statute. It amends not by changing any provisions of previously enacted laws, but by making additions thereto

especially applicable to local conditions in Alaska. This appears the more obvious when all of the laws affecting the acquisition of rights to coal lands are grouped in chronological order as they appear in Pierce's Federal Code.

Nothing is to be implied from the peculiar phraseology of the fourth and last section. By its words all the provisions of the coal land laws of the United States not in conflict with the provisions of this act shall continue and be in full force in the district of Alaska. This continues the existing status as to all the provisions of the coal land laws of the United States not in conflict with the new enactment. If there be conflicting provisions, the older enactments yield to the new. Provisions which do not conflict continue in force, and, when conditions shall be changed so that their requirements may be complied with, it will be legal and practicable to make cash entries and acquire preferential rights. A foreign corporation cannot lawfully acquire or hold a coal claim in Alaska either in its corporate name or in the name of any agent or trustee. Therefore, for the reason that the indictment charges a conspiracy to acquire coal claims or proprietary rights to coal claims in Alaska for a foreign corporation, it must be sustained as a valid indictment, and the objection to the introduction of evidence must be overruled. The court will, however, instruct the jury that, to justify a conviction of the defendants under it, the evidence must prove that the object of the conspiracy, if any, must have been to perpetrate a fraud by securing coal claims or proprietary rights in coal claims in Alaska for the Pacific Coal & Oil Company.

Addenda.

After the announcement by the court of its decision and ruling on the objection to the introduction of evidence, as indicated in the foregoing opinion, in order to facilitate a review of the decision by the supreme court, the trial was terminated, pursuant to a stipulation, by and between counsel for the government and counsel for the several defendants, by the following proceedings:

(1) The government does now and here abandon for all time the charges in the indictment of the foreign or alien character of the Pacific Coal & Oil Company as an element of the crime sought to be charged by the indictment.

(2) Defendants now move the court that the indictment be quashed and that the defendants be discharged, upon the following grounds: (1) That the indictment in this case does not charge the defendants, or any of them, with any crime or offense against the United States, nor with the violation of any law of the United States. (2) That the said indict-

ment does not charge the defendants, or any of them, with the crime or offense of conspiracy to defraud the United States. (3) That said indictment fails to allege the doing or committing of any overt act or acts by any of the defendants to effect the object of any conspiracy to defraud the United States.

This motion is based upon the general grounds that the laws of the United States regulating the disposition of coal lands in the district of Alaska during the times set forth in the indictment did not prohibit the transactions, or any of them, charged in the indictment, as contemplated by and a part of the alleged conspiracy therein set forth. In order to obviate any question of double jeopardy, and for the purpose of making the record in such form that a writ of error will lie to the supreme court in favor of the government, under Act March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. Comp. St. Supp. 1909, p. 220), the government now moved that the court withdraw one of the jurors before ruling upon the motion just interposed on behalf of the defendants. The defendants and each of them, being personally present, consent to the withdrawal of the juror by the court, as requested by counsel for the government, and Mr. Funk, one of the jurors, is thereupon excused and withdrawn from the jury by the court.

PER CURIAM. The motion made on behalf of the defendant is granted by the court, the indictment is quashed, and the defendants are discharged. This ruling is based upon a construction of the coal land laws of the United States applicable to the district of Alaska, and the grounds of the court's ruling are as set forth in the written opinion or opinions filed or to be filed herein.

Counsel for the government asks that an exception be noted to the ruling of the court, and the exception is allowed by the court.

UNITED STATES v. DOUGHTEN.

[Circuit Court E. D. Washington, E. D., April 15, 1911.]

186 Fed. 226.

1. Coal Lands—Conspiracy—Indictment.

An indictment charging a conspiracy to defraud the United States by obtaining title to 5000 acres of coal land by means of thirty-nine false, fraudulent and fictitious entries made by as many different persons ostensibly for their own use, but in truth, etc., held to charge a crime under section 2350 of the Revised Statutes.

2. Same—Alaska—Statutes.

The prohibitions and limitations of section 2350, United States Revised Statutes, held to apply to coal entries made in the district of Alaska under the Act of April 28, 1904, the object and purpose of the latter act being to provide for a difference only in the mode of location, the time and manner of making final proof and the trial of adverse claims.

3. Construction of Statutes.

The subsequent legislative acts of congress may be considered in arriving at the intent of a particular statute.

Charles H. Doughten and others were indicted for conspiracy to defraud the United States in connection with coal land claims in Alaska. Demurrer to the indictment. Overruled.

B. D. Townsend, Special Assistant Attorney General, Oscar Cain, U. S. Attorney, and E. C. MacDonald Assistant U. S. Attorney.

For defendants Doughten and Brown—James E. Fenton.

For defendant White—James E. Fenton and Frank H. Graves.

For defendants Charles A. McKenzie and Donald A. McKenzie—J. W. Roberts (E. C. Hughes of counsel).

RUDKIN, District Judge. The Act of March 3, 1873, relating to the entry and sale of coal lands, is embodied in sections 2347 to 2352, inclusive, of the Revised Statutes (U. S. Comp. St. 1901, pp. 1440-1441), which read as follows:

"Sec. 2347. Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall upon application to the register of the proper land office, have the right to enter, by legal subdivisions, any quantity of vacant coal lands of the United States not otherwise appropriated or reserved by compe-

tent authority, not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment to the receiver of not less than ten dollars per acre for such lands where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road.

"Sec. 2348. Any person or association of persons severally qualified, as above provided, who have opened and improved, or shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference right of entry, under the preceding section, of the mines so opened and improved: Provided, that when any association of not less than four persons, severally qualified as above provided, shall have expended not less than five thousand dollars in working and improving any such mine or mines, such association may enter not exceeding six hundred and forty acres, including such mining improvements.

"Sec. 2349. All claims under the preceding section must be presented to the register of the proper land district within sixty days after the date of actual possession and the commencement of improvements on the land, by the filing of a declaratory statement therefor; but when the township plat is not on file at the date of such improvement, filing must be made within sixty days from the receipt of such plat at the district office; and where the improvements shall have been made prior to the expiration of three months from the third day of March, eighteen hundred and seventy-three, sixty days from the expiration of such three months shall be allowed for the filing of a declaratory statement, and no sale under the provisions of this section shall be allowed until the expiration of six months from the third day of March, eighteen hundred and seventy-three.

"Sec. 2350. The three preceding sections shall be held to authorize one entry by the same person or association of persons; and no association of persons any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions; and all persons claiming under section twenty-three hundred and forty-eight shall be required to prove their respective rights and pay for the lands filed upon within one one year from the time prescribed for filing their respective claims; and upon failure to file the proper notice, or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant.

"Sec. 2351. In case of conflicting claims upon coal lands where the improvements shall be commenced after the third day of March, eighteen hundred and seventy-three, priority of possession and improvement, followed by proper filing and continued good faith, shall determine the preference-right to purchase. And also where improvements have already been made prior to the third day of March, eighteen hundred and seventy-three, division of the land claimed may be made by legal subdivisions, to include, as near as may be, the valuable improvements of the respective parties. The Commissioner of the General Land Office

is authorized to issue all needful rules and regulations for carrying into effect the provisions of this and the four preceding sections.

"Sec. 2352. Nothing in the five preceding sections shall be construed to destroy or impair any rights which may have attached prior to the third day of March, eighteen hundred and seventy-three, or to authorize the sale of lands valuable for mines of gold, silver, or copper."

The Act of June 6, 1900 (31 Stat. 658 [U. S. Comp. St. 1901, p. 1441]), extended the provisions of the foregoing sections to the District of Alaska.

The Act of April 28, 1904 (33 Stat. 525 [U. S. Comp. St. Supp. 1909, p. 556]), which by its title purports to amend the Act of June 6, 1900, provides as follows:

"That any person or association of persons qualified to make entry under the coal land laws of the United States, who shall have opened or improved a coal mine or coal mines on any of the unsurveyed public lands of the United States in the district of Alaska, may locate the lands upon which such mine or mines are situated, in rectangular tracts containing forty, eighty or one hundred and sixty acres, with north and south boundary lines run according to the true meridian, by marking the four corners thereof with permanent monuments, so that the boundaries thereof may be readily and easily traced. And all such locators shall, within one year from the passage of this act, or within one year from making such locations, file for record in the recording district, and with the register and receiver of the land district in which the lands are located or situated, a notice containing the name or names of the locator or locators, the date of the location, the description of the lands located, and a reference to such natural objects or permanent monuments as will readily identify the same.

"Sec. 2. That such locator or locators, or their assigns, who are citizens of the United States, shall receive a patent to the lands located by presenting, at any time within three years from the date of such notice, to the register and receiver of the land district in which the lands so located are situated an application therefor, accompanied by a certified copy of a plat of survey and field notes thereof, made by a United States deputy surveyor or a United States mineral surveyor duly approved by the surveyor general for the district of Alaska, and a payment of the sum of ten dollars per acre for the lands applied for; but no such application shall be allowed until after the applicant has caused a notice of the presentation thereof, embracing a description of the lands, to have been published in a newspaper in the district of Alaska published nearest the location of the premises for a period of sixty days, and shall have caused copies of such notice, together with a certified copy of the official plat of survey, to have been kept posted in a conspicuous place upon the land applied for and in the land office for the district in which the lands are located for a like period, and until after he shall have furnished proof of such publication and posting, and such other proof as is required by the coal land laws: Provided, that nothing herein contained shall be so construed as to authorize entries to be made or title to be acquired to the shore of any navigable waters within said district.

"Sec. 3. That during such period of posting and publication, or within six months thereafter, any person or association of persons having or asserting any adverse interest or claim to the tract of land or any part thereof sought to be purchased shall file in the land office where such application is pending under oath, an adverse claim, setting forth the nature and extent thereof, and such adverse claimant shall within sixty days after the filing of such adverse claim, begin an action to quiet title in a court of competent jurisdiction within the district of Alaska, and thereafter no patent shall issue for such claim until the final adjudication of the rights of the parties, and such patent shall then be issued in conformity with the final decree of such court therein.

"Sec. 4. That all the provisions of the coal land laws of the United States not in conflict with the provisions of this act shall continue and be in full force in the district of Alaska."

The Act of May 28, 1908 (35 Stat. 424 [U. S. Comp. St. Supp. 1909, p. 557]), contains these further provisions:

"That all persons, their heirs or assigns, who have in good faith personally or by an attorney in fact made locations of coal land in the territory of Alaska in their own interest, prior to November twelfth, nineteen hundred and six, or in accordance with circular of instructions issued by the Secretary of the Interior May sixteenth, nineteen hundred and seven, may consolidate their said claims or locations by including in a single claim, location, or purchase not to exceed two thousand five hundred and sixty acres of contiguous lands, not exceeding in length twice the width of the tract thus consolidated, and for this purpose such persons, their heirs, or assigns, may form associations or corporations who may perfect entry of and acquire title to such lands in accordance with the other provisions of law under which said locations were originally made: Provided, that no corporation shall be permitted to consolidate its claims under this act unless seventy-five per centum of its stock shall be held by persons qualified to enter coal lands in Alaska.

"Sec. 2. That the United States shall, at all times, have the preference right to purchase so much of the product of any mine or mines opened upon the lands sold under the provisions of this act as may be necessary for the use of the army and navy, and at such reasonable and remunerative price as may be fixed by the President; but the producers of any coal so purchased who may be dissatisfied with the price thus fixed shall have the right to prosecute suits against the United States in the Court of Claims for the recovery of any additional sum or sums they may claim as justly due upon such purchase.

"Sec. 3. That if any of the lands or deposits purchased under the provisions of this act shall be owned, leased, trusteed, possessed, or controlled by any device permanently, temporarily, directly, indirectly, tacitly, or in any manner whatsoever so that they form part of, or in any way effect any combination, or are in any wise controlled by any combination in the form of an unlawful trust, or form the subject of any contract or conspiracy in restraint of trade in the mining or selling of coal, or of any holding of such lands by any individual, partnership, association, corporation, mortgage, stock ownership, or control, in excess of two thousand five hundred and sixty acres in the district of Alaska, the title thereto shall be forfeited to the United States by proceedings

instituted by the Attorney General of the United States in the courts for that purpose.

"Sec. 4. That every patent issued under this act shall expressly recite the terms and conditions prescribed in sections two and three hereof."

The indictment in this case was returned under section 5440 of the Revised Statutes (U. S. Comp. St. 1901, p. 3676), which declares:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars, and to imprisonment not more than two years."

On his arraignment the defendant Charles A. McKenzie interposed a demurrer to the indictment, and the questions raised by the demurrer are now presented for decision. Inasmuch as the demurrer goes to the substance of the charge and not to mere matters of form, it is deemed sufficient for our present purposes to state in general terms that the indictment charges a conspiracy on the part of the defendants to defraud the United States by obtaining title to upwards of 5,000 acres of coal land in the district of Alaska, of the value of upwards of $2,000,000, by means of thirty-nine false, fraudulent, and fictitious entries, made by as many different persons, ostensibly for their own use and benefit, but in truth and in fact for the use and benefit of the defendants, whereby the defendants will be enabled to receive and enjoy the benefit of a greater number of coal entries and locations and a greater quantity of coal land than is permissible under the law. I understand counsel for the demurring defendant to concede that the indictment charges a crime, if the prohibitions and limitations contained in section 2350 of the Revised Statutes apply to coal entries made in the district of Alaska under the Act of April 28, 1904, but, if this concession be not made, the question is no longer an open one. United States v. Trinidad Coal Co., 137 U. S. 160, 11 Sup. Ct. 57, 34 L. Ed. 640; United States v. Keitel, 211 U. S. 370, 29 Sup. Ct. 123, 53 L. Ed. 230; United States v. Portland Coal & Coke Co. (C. C.), 173 Fed. 566.

The position of the defendants, as I gather it from the briefs and arguments of counsel, is this: They contend that the Act of 1904 is complete within itself, and bears a close analogy to the mineral land act; that under its provisions there is no limit to the number of entries or locations a person may make, or to the number of assignments he may take; that the provision of section 4, continuing the nonconflicting provision of the coal land laws of the United States in full force in the district of Alaska, continues such laws in force as to surveyed lands only; in fine, that the act is a new departure in coal land legislation, and was enacted by congress in recognition of the well-known fact that the

existing laws were not adapted to local conditions in that distant territory. This argument is engaging and plausible, but to my mind it is neither convincing nor controlling. The supposed analogy to the mineral land act is found, first, in the requirement of section 1 of the act that the lands shall be located in rectangular tracts, containing 40, 80, or 160 acres, with north and south boundary lines run according to the true meridian, by marking the four corners with permanent monuments, and that the location notice shall be filed for record in the recording district, as well as with the register and receiver of the district land office; second, in the provision of section 2 of the act recognizing assignments and prescribing the mode of making proof; and, third, in the provision of section 3 of the act prescribing the mode and place of trial of adverse claims. I find nothing in these several provisions to indicate a general change of policy on the part of the government. These coal claims are located on unsurveyed lands. They cannot be described by reference to the public surveys, and the only thing left is to tie the descriptions to permanent monuments on the ground. The local land offices in Alaska are inaccessible, and in this fact I find a sufficient explanation and justification for the requirement that the location notices shall be filed in the recording district, and adverse claims tried out in the civil courts, which are accessible to the people. The provision of section 2 in relation to assignments is but the legislative recognition of a right which the department had rightfully or wrongfully accorded to entry men under the act of 1873 for a period of thirty years prior to the passage of the act of 1904. The argument that the Act of 1873 is not adapted to local conditions in Alaska tends equally to show that it is not adapted to conditions in any other section of the country. It may be that the act tends to promote fraud and perjury, and that 40, 80, or 160 acres of coal land is of little or no value to the individual, but this argument should be addressed to congress, and not to the courts. It is a matter of familiar history that at the time of the passage of the act of 1873 the great coal fields of the western part of the United States were as far removed from civilization and from transportation facilities as are the coal fields of Alaska to-day, yet the policy of the government to confer a right upon the individual and prevent monopoly has never been departed from in the nearly forty years that have elapsed since the date of its passage. Furthermore, questions of general governmental policy such as this must be determined by congress, and not by the courts. The question here presented is one purely of statutory construction; and, however firmly a court might disbelieve in the past coal land policy of the government, it would usurp authority not conferred upon it, should it attempt to establish a policy in defiance of the will of congress. That body, acting

within its constitutional authority, is the final arbiter of the public policy of the nation, and while the courts, unaided by legislative declaration, and applying the principles of the common law, may uphold or condemn contracts in the light of what is conceived to be public policy, their determination as a rule for future conduct must yield to the legislative will when expressed in the mode prescribed by the fundamental law. Turning now to the legislation in question, what was the legislative intent as evidenced by the act of 1904? The original act of 1873 did not by its own terms extend to the district of Alaska. In 1900 congress extended its provisions to that district, and there is not a word or a line in the extending act to indicate any change of policy on the part of the government at that time. It was later discovered that the act was not adapted to conditions there, not because a person could not make a sufficient number of coal entries, nor because he could not take a sufficient number of assignments, but because he could not acquire title at all until the public surveys were extended. It is true that under section 2 of the act of 1873 a person might acquire a preference right of purchase on unsurveyed lands, but he could not acquire title until the public surveys were extended. The mere preference right was therefore a barren one, unless there was a reasonable expectation that the public surveys would be extended so that the locator could obtain title at some time in the near future. It was to remedy this defect, and not to enlarge the rights of the entry man, that the act of 1904 was passed. Its sole purpose in my opinion was to enable locators to acquire title to coal land on unsurveyed public lands. There is nothing in the act inconsistent with this view, nor is there anything in the act, so far as I can discover, inconsistent or in conflict with the provisions of section 2350 of the Revised Statutes, prohibiting more than a single entry by a single individual. The conflicting provisions in the act of 1904 relate to the mode of location, the time and manner of making final proof, and the manner of trial of adverse claims, and I find no other conflict between the two acts. The fact that section 2350 of the Revised Statutes limits its operation to entries made under the three preceding sections is to my mind of no moment. The original act used the expression, "this act," instead of "the three preceding sections," and in its last analysis the provision meant only that no more than one coal land entry by a single individual was permissible. This conclusion is fortified by the act of 1908. This latter act, as clearly appears from its title and subject-matter, is an enabling statute, and was intended to extend and enlarge the rights of locators in Alaska. Yet, if we accept the views of the defendants such an enactment was wholly unnecessary, for locators possessed far greater rights under the act of 1904 than are accorded to them under the later enactment. While the act of 1908 was passed long after the commission

of the acts charged in the indictment and cannot render criminal, acts which were innocent at the time of their commission, it may nevertheless be looked to for the purpose of ascertaining the legislative intent. The act of 1900, the act of 1904, and the act of 1908 are all *in pari materia,* and must be construed together. "All consistent statutes which can stand together, though enacted at different dates, relating to the same subject, and hence briefly called statutes *in pari materia,* are treated prospectively, and construed together, as though they constituted one act. This is true, whether the acts relating to the same subject are passed at different dates, separated by long or short intervals, at the same session, or on the same day. They are all to be compared, harmonized, if possible, and, if not susceptible to a construction which will make all of their provisions harmonious, they are made to operate together, so far as possible, consistently with the evident intent of the legislative enactment." Sutherland, Stat. Const. 283. "Where there are earlier acts relating to the same subject, the survey, must extend to them. They all are, for the purpose of construction, considered as forming one homogeneous and consistent body of law, and each of which may explain and elucidate every other part of the common system to which it applies." Endlich, Interpretation of Stat. § 43.

Thus, in United States v. Moore, 161 Fed. 513, 88 C. C. A. 455, the Circuit Court of Appeals for this circuit held that the Act of July 4, 1884, 23 Stat. 79, the Act of March 3, 1905, 33 Stat. 1064, and the Act of March 8, 1906, 34 Stat. 55, relating to certain Indian lands, were *in pari materia,* and the two later acts were examined and considered by the court in determining the validity of a conveyance made years before their passage. When these several coal land acts are construed togther, I am convinced that Congress never intended that an association of individuals should be able to acquire title to vast areas of coal land in the district of Alaska or elsewhere by means and devices such as are set forth in this indictment.

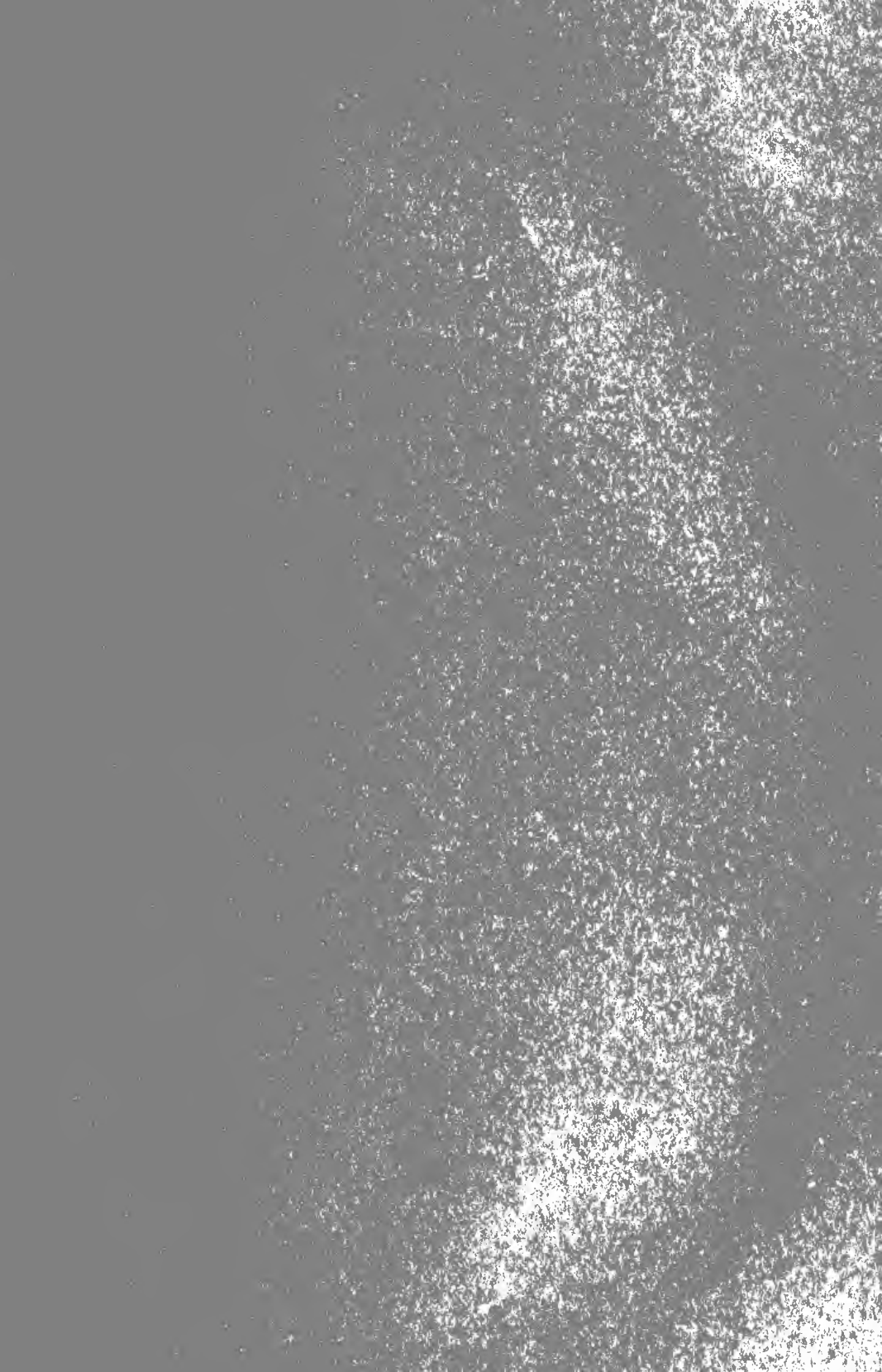
It was urged in argument that criminal statutes must be strictly construed, and this rule is elementary, but it has no application to the coal land laws of Alaska. If the means employed by these defendants to acquire title to the coal lands in question are illegal and a fraud upon the United States, it must be so declared in every court in which the question arises, whether that court is exercising civil or criminal jurisdiction. On the trial of the action questions of criminal intent and other like questions peculiar to penal laws may arise, but they are not presented at this stage of the case, and do not appear on the face of the indictment. I reach this conclusion with some hesitation for two reasons: First, because able counsel who have argued the case on behalf of the

defendants do not deem the question even a debatable one; and, second, because the Circuit Court of the United States for the Western District of Washington has reached a contrary conclusion on the same state of facts.[1] Nevertheless I am so firmly convinced of the correctness of the conclusions here announced that my judgment will yield only to the mandate of some court of superior jurisdiction.

The demurrer is overruled.

---

1 See United States v. Munday, *ante*.



APPENDIX.

Forms for the organization of a special drainage district under the statutes of Illinois from the preliminary bond to the contract for the work and the contractor's bond. *

Cost Bond.

Know all men by these presents, that we, W. S. McCullough, E. W. Lawton and J. M. Curtis are held and firmly bound unto the People of the State of Illinois, for the use of the officers of the County Court of Bureau County in the State of Illinois, and of all other parties to whom costs have, or shall have accrued by virtue of the proceedings hereinafter mentioned, in the penal sum of five hundred (500) dollars, good and lawful money of the United States, for the faithful payment of which, well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Signed and sealed with our seals and delivered this 1st day of April, A. D. 1899.

The condition of the above obligation is such that whereas, a certain petition for the formation and organization of a special drainage district, known as The Mineral Marsh Special Drainage District in the Counties of Bureau and Henry and State of Illinois, comprising lands situated in the Townships of Mineral and Gold in Bureau County, and Annawan and Alba in Henry County, signed by W. S. McCullough and others, is about to be presented to the County Court of Bureau County, Illinois, accompanied with this bond. Now, therefore, if the above named obligors herein shall well and truly pay or cause to be paid all costs in said proceeding to the officers of said County Court of Bureau County, Illinois, and to all other parties interested, which have accrued, or shall have accrued, in case said district be not established, then this obligation to be void, otherwise to be and remain in full force and effect.

(signed) W. S. McCullough (seal).
(signed) E. W. Lawton (seal).
(signed) J. M. Curtis (seal).

Petition to the County Court.

To the Honorable Richard M. Skinner, Judge of the County Court of the County of Bureau in the State of Illinois:

The undersigned petitioners, respectfully represent unto your honor that they are each of lawful age and are together a majority in number of the adult owners of the lands lying within the proposed special drainage district hereinafter described, and that they are also the owners, in the aggregate, of more than one-third of the lands within said proposed drainage district, and that they are also the owners, in the aggregate of a major part of the lands within said proposed drainage district,

*These forms are those actually employed in the formation of the Mineral Marsh Special Drainage District, Bureau and Henry Counties, Illinois, and are furnished us by the courtesy of Mr. Geo. S. Skinner of Princeton, Illinois, attorney fgor the petitioners in the case.

and that they also constitute, when taken together, more than one-third of the owners of the lands within said proposed special drainage district.

Your petitioners further represent that the lands situated and lying within the boundaries of and comprising said proposed district are situated in four townships in different counties, and that a major part of said lands are situated in Bureau County, and that said lands are low, wet and flat and require a combined system of drainage and protection from overflow and wash, and your petitioners desire that a special drainage district may be organized embracing and comprising the lands hereinafter described, for the purposes of constructing, repairing and maintaining a ditch, or ditches, a drain or drains, an embankment, or embankments, a grade, or grades, or any or either of them, or all, within said proposed drainage district, for agricultural and sanitary purposes, by special assessment upon the lands and property benefited thereby.

Your petitioners further represent and show that the names of the owner or owners of each tract of land within said proposed district, so far as known, together with his or her or their post office address, will hereinafter be found opposite each several tract comprising said district, respectively, the same being arranged in schedule form as a part of this petition, and when the owner or owners of any specified tract are not known that fact is so stated, and when the post office address of any of said owners, whether named or unknown, is unknown that fact is also so stated herein.

Your petitioners further represent and show that the names of the owner or owners of each tract of land within said proposed district, so far as known, together with his or her or their post office address, will hereinafter be found opposite each several tract comprising said district, respectively, the same being arranged in schedule form as a part of this petition, and when the owner or owners of any specified tract are not known that fact is so stated, and when the post office address of any of said owners, whether named or unknown, is unknown that fact is also so stated herein.

Your petitioners therefore pray that a special drainage district, to be named and known as *The Mineral Marsh Special Drainage District* in the Counties of Bureau and Henry and State of Illinois, may be organized under and in pursuance of the provisions of an act of the General Assembly of the State of Illinois, entitled, "An Act to provide for drainage for agricultural and sanitary purposes, and to repeal certain acts therein named," approved June 27th, 1885, in force July 1st, 1885, and amendments thereof, for the purposes of constructing, repairing and maintaining a ditch, or ditches, a drain, or drains, an embankment, or embankments, a grade or grades, or all, any, or either of them, within the limits of said proposed district as designated by the list of lands herein below following, by special assessment upon the lands and property benefited thereby, the said lands, tract by tract, with the owners' names and post office addresses, so far as known, set opposite, relatively and respectively, being as follows, to-wit:

Description of Lands						Owners' Names	Post Office Addresses
Sub-divisions	Section	Township	Range	County	No. Acres		
NW ¼	4	16	6	Bureau	41.79	James Giltner	Putnam, Illinois

[Here follow other names and descriptions.]

Drainage Notice.

STATE OF ILLINOIS, }
Bureau County. } ss.

In the County Court, June Term, A. D. 1899.

In the matter of the Organization of the Mineral Marsh Special Drainage District in the Counties of Bureau and Henry and State of Illinois.

To all whom it may concern:

Notice is hereby given that on the 6th day of June, A. D. 1899, there was presented to the County Court of Bureau County (being the County in which the greater part of the lands hereinafter described are situated) a petition signed by W. F. Lawton, now deceased, W. S. McCullough and others asking for the organization of a special drainage district to be known as The Mineral Marsh Special Drainage District in the Counties of Bureau and Henry and State of Illinois, which said petition is in the words and figures following, to wit: (here in the notice given was set out the petition *ante* No. 2).

And all persons interested are hereby informed and notified that a hearing on said petition will be had at the July Term, A. D. 1899, on Monday, July 3d at the hour of ten o'clock a. m. at the County Court Rooms in the Court House in the City of Princeton, Bureau County, State of Illinois, when and where all persons interested may appear and be heard if they see fit so to do.

(signed) WILLIAM WILSON,
County Clerk of Bureau County and Clerk of the County Court of said County.

(signed) GEO. S. SKINNER, Attorney for Petitioners.

Certificate of Mailing Notices.

STATE OF ILLINOIS, }
Bureau County. } ss.

I, William Wilson, County Clerk of Bureau County, Illinois, do hereby certify that on June 15th, A. D. 1899, I did mail a notice of which the drainage notice hereto attached is a true copy, to each of the following named persons (except to Anna Elizabeth Gingrich which was mailed on June 17th, A. D. 1899), which notice was enclosed in an envelope and postage prepaid by me and addressed to the respective and corresponding post office address for each of said persons as shown below, and that said notices thus mailed by me were exact copies of the one hereto attached, and that such copy of said notice was thus mailed by me to each person owning lands in the proposed drainage district, whose name or post office address, or place of residence is given, in the petition set out in said notice, whether his or her name appears signed to said petition or not, to wit:

James Giltner Putnam, Illinois.

[Here follow other names.]

I further certify that I caused a like notice to be published in the Bureau County Times, a weekly and public newspaper of general circulation, printed and published in Sheffield, in Bureau County, Illinois, for three successive weeks prior to the day fixed in said notice for a hearing on said petition, and also a like notice to be published in the Atkinson Herald, a weekly and public newspaper of general circulation printed and published in Atkinson in Henry County, Illinois, for three successive weeks prior to the day fixed in said notice for a hearing on said petition, the

first publication in each of said papers being more than twenty days before the time fixed in said notice for a hearing on said petition.

And I further certify that I gave other and further notice of said proceeding by causing to be posted like notices in five public places in each of the four townships in which said proposed drainage district is situated, that is to say, five in the township of Mineral, five in the township of Gold, in Bureau County, and five in the township of Annawan, and five in the township of Alba, in Henry County, and that each and all of said notices were so posted at least twenty days prior to the day fixed in said notice for a hearing on said petition, all of which will more fully appear by the affidavit of posting and the respective certificates of the publishers of the publication of said notice, herewith filed in this proceeding.

Witness my official hand and the seal of said court this 3d day of July, A. D. 1899. (signed) WILLIAM WILSON,
County Clerk of Bureau County, Illinois.

Order Temporary Organization, Appointment of Commissioners and Fixing Date for Hearing on Report.

STATE OF ILLINOIS, } ss.
Bureau County. }

In the County Court, July Term, A. D. 1899.

In the matter of the Petition for the Organization of the Mineral Marsh Special Drainage District in the Counties of Bureau and Henry and State of Illinois.

And now this cause coming on for further hearing, pursuant to the continuance thereof on July 3d, 1899, at which last mentioned date, being the time fixed by order of this court entered herein June 6th, 1899, for the hearing on said petition, came the petitioners, W. S. McCullough and others and George S. Skinner, their attorney for them, and read and submitted to the court the original petition filed herein June 6th, 1899, and the bond of petitioners, W. S. McCullough, E. W. Lawton and J. M. Curtis filed with and accompanying said petition, and thereupon, on motion of petitioners, leave of court to amend the petition was granted on said motion and the petition accordingly amended by substituting the name of Anna Elizabeth Gingrich, in place of that of John Wagner, who has been long dead, as the owner of the tract described in said petition as the "SE qr SW qr 4—16—6," 40 acres in Bureau County, and also by adding to said petition as signers thereto the names of Henry F. Rieder, Robert J. Rieder, Fred E. Rieder, Charles Rieder, and John E. Rieder, their petition therefor having been filed herein on said July 3d at the said time of hearing, and on further motion of the petitioners, M. U. Trimble, an attorney of this court, was duly appointed guardian *ad litem* for Emma Rieder, a minor, and landowner of lands in said petition whose name is upon said petition among others as landowner, she being the only person known to petitioners as a landowner of lands within the proposed district who is a minor, and the said guardian *ad litem* having filed his answer for and in behalf of said infant, Emma Rieder, praying strict proof of the matters alleged in said petition, and full protection of her interest in the premises, and thereupon the said cause proceeding to a hearing upon the said petition, as amended: the answer of the said guardian *ad litem*, the certificate of the clerk of the posting, publication and mailing of notice of said hearing, the affidavit of Fred G. Boyden of the posting of notices, the certificate of Fred G. Boyden, publisher, of the publication of notice of the hearing in the Bureau County Times, the certificate of D. Griffin, publisher, of the publication

of notice of the hearing in the Atkinson Herald, and the affidavits of E. W. Lawton, William McCabe and J. M. Curtis signers to said petition in support of the petition, all filed herein July 3d, 1899, and the court having heard the testimony of witnesses produced and examined in open court touching the matters alleged in said petition, especially the testimony of Henry Scott, Scott Buswell, E. W. Lawton, and W. S. McCullough witnesses sworn and examined in behalf of petitioners, and the court thereupon having by announcement given opportunity to any person interested to controvert any material statements contained in said petition, and such opportunity being especially extended to any person owning lands within the proposed district, and no person appearing to deny or controvert the allegations or material statements contained in the petition, the court thereupon continued the further hearing of said cause by announcement and by order duly entered until Wednesday, July 5th, 1899, at 10 o'clock a. m. with leave to the petitioners to file in the meantime a supplemental affidavit in support of their petition, and now, on said last mentioned date, this cause coming on as aforesaid, and the petitioners having filed herein their supplemental affidavits of E. W. Lawton, William McCabe and J. M. Curtis sworn to by them July 4th, 1899, and setting forth matters not fully covered in support of said petition in their former affidavit filed herein and showing them to be credible signers on said petition, and the court now having fully examined all the aforesaid papers and documents, including the last mentioned supplemental affidavit filed herein July 5th, 1899, and having fully considered the evidence in this proceeding, doth find therefrom, that said petition was filed herein June 6th, 1899, accompanied with a bond executed by W. S. McCullough, E. W. Lawton and J. M. Curtis in the penal sum of five hundred (500) dollars running to the People of the State of Illinois, for the use of the officers of the County Court of Bureau County, and to all other parties to whom costs have, or shall have, accrued by virtue of these proceedings in case said district be not established, filed with said petition as required by statute, and which said bond was duly approved by the County Judge of said Bureau County, Illinois, on said June 6th, 1899; that said petition is sufficient in form and is signed by the owners in the aggregate of more than one-third of the lands lying in the proposed district, and that the signers thereto are the owners of the major part of the lands in said proposed district, and that said signers to said petition constitute one-third or more of the owners of the lands within the proposed district: that the lands within the proposed district are low, wet and flat and require a combined system of drainage and protection from wash or overflow, and that the petitioners desire that a special drainage district may be organized comprising the lands therein mentioned, for the purposes of constructing, repairing and maintaining a ditch, or ditches, a drain or drains, an embankment or embankments, a grade or grades, or any or either of them, or all, within said proposed district, for agricultural and sanitary purposes, by special assessment upon the lands and property benefited thereby; that due and proper notice (containing a copy of said petition) of the filing of said petition and stating the term of court and the time and place fixed by order of the court as aforesaid, when said petition and all parties interested would be heard, has been given by the posting of notices in at least five public places in each of the four townships in which said proposed district or any part thereof, is situated, more than twenty days before the time fixed as aforesaid for the hearing on said petition, and by the publication of such notice for three successive weeks in a weekly and public newspaper of general circulation published in each of the counties in which said proposed district or any part thereof is situated, the publication of such notice being in the Atkinson Herald, printed and published in Atkinson,

Henry County, Illinois, and in the Bureau County Times, printed and published in Bureau County, Illinois, the first publication of which said notice in each of said newspapers in said counties being at least twenty days before the day of hearing fixed as aforesaid, and by the mailing of a copy of said notice by the clerk of this court to each person owning land in said proposed district whose name and post office address or place of residence is given more than ten days before the time fixed for the hearing on said petition; that said notice was thus given by the clerk of this court, and that said notices were thus posted, published, and mailed by him or under his authority and by his direction, and that the certificate of said clerk of the giving of such notice by posting, publication and mailing is in due form, and the certificates of publication of the respective publishers are also in due form and regular and that the court has full jurisdiction of the subject-matter of said petition and of all of the parties thereto.

The court therefore finds in favor of the petitioners, and hereby orders that the prayer of their petition be and the same is hereby granted, and that a temporary drainage district to be known as the Mineral Marsh Special Drainage District in the Counties of Bureau and Henry and State of Illinois, be and the same is hereby organized, embracing the lands described in said petition, as therein prayed, and that E. W. Lawton, Scott Bushwell and Alonzo Collins, be and they are hereby appointed preliminary drainage commissioners of said drainage district, and it is further ordered that said commissioners report to the court on Tuesday, July 25th, 1899, at one o'clock in the afternoon of said day, being the time hereby fixed for the hearing of the said report of said commissioners and to complete the organization of said drainage district, to which time this cause is hereby continued.

(signed) RICHARD M. SKINNER,
County Judge.

Oaths of Preliminary Commissioners.

STATE OF ILLINOIS, }
Bureau County. } ss.

I, E. W. Lawton, do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of Illinois, and that I will faithfully discharge the duties of the office of preliminary drainage commissioner of the Mineral Marsh Special Drainage District in the Counties of Bureau and Henry and State of Illinois, according to the best of my ability, so help me God.

(signed) E. W. LAWTON.

Subscribed and sworn to before me this 8th day of July, A. D. 1899.

(signed) GEO. W. BOYDEN.
(Seal) Notary Public.

Commissioners' Report with Engineer's Report.

STATE OF ILLINOIS, }
Bureau County. } ss.

In the County Court, August Term, A. D. 1899.

In the matter of the Organization of the Mineral Marsh Special Drainage District in the Counties of Bureau and Henry and State of Illinois.

The undersigned, Drainage Commissioners of said District beg leave to submit the following report of their acts and doings in the matter before them, pursuant to

the order of the court under which they were appointed, and bearing date July 5th, 1899, with their recommendations concerning the proposed work.

The said undersigned Commissioners, having upon their appointment first duly qualified by taking the constitutional oath of office required by law, did thereupon at once enter upon the duties of their said office, and in pursuance of law, did proceed to the examination of the lands in said proposed district and personally examine the same and did employ, W. A. Darling, a competent civil engineer to make all necessary surveys and estimates as in the judgment of said commissioners was thought necessary and proper, and as he was directed by them, the report and estimates of the said engineer concerning the costs of the construction of the proposed ditches being herewith presented and hereto attached and made a part of this report.

And said commissioners having from their own personal examination of the lands mentioned in the petition for the organization of said district and from the report and estimates of said engineer aforesaid, and from his other information given them more in detail in line of his employment and other information and observation, become quite well and fully informed on the matters before them, do respectfully report:

1st. That the lands lying within the boundaries and limits of said proposed district are low, wet and flat and require a combined system of drainage and protection from wash and overflow for agricultural and sanitary purposes.

2d. That by the construction of proper and suitable ditches in said district the lands mentioned in said petition will be greatly benefited and their value for agricultural purposes enhanced in the aggregate not less than twenty (20) dollars per acre on an average throughout said district, or somewhere about two hundred thousand (200,000) dollars as a whole, and in any event an amount greatly exceeding the total cost of the improvements and the costs and expenses incident to the organization of the district.

3d. That the public highways in said district will in our judgment be benefited, and in the event laterals are constructed in places on the highways the benefit to the highways in places will be considerable.

4th. The commissioners have been in correspondence with Government officers concerning the relations of the proposed ditches to the right of way of the Illinois and Mississippi Canal running through said district, and from prospects will be able to co-operate with the Government authorities in locating and constructing the ditches of the district and in crossing the right of way for said canal, to the mutual advantage and benefit of both the Government and said district.

5th. That the approximate cost of the constructing the necessary main ditches and laterals, including the reasonable estimate on obtaining the necessary rights of way thereof, and including the engineering work and surveying will be some forty thousand (40,000) dollars, and we estimate the other expenses, that is, the court costs, attorneys' fees, commissioners' compensation, printing and incidental costs and expenses at about five thousand (5,000) dollars.

We employed said engineer believing the services of such help to be indispensable and in our opinion desirable and necessary, and in his report to us he includes reference to the plat marked "Exhibit A" which is herewith filed and presented, and reference made for such general information concerning the lay of the ditches recommended for said district, which in some small and not material respects may be changed as better acquaintance with the lands may warrant.

In conclusion, from our acquaintance with the lands in said district after such especial examinations made by us and the data furnished us by said engineer we recommend the order of the court for a final organization of said district, as desirable and necessary. Respectfully submitted,

Princeton, Illinois, September 1st, 1899.

(signed) E. W. LAWTON,
(signed) ALONZO COLLINS,
(signed) SCOTT BUSWELL,
Commissioners as aforesaid.

Engineer's Report.

STATE OF ILLINOIS, } ss.
Bureau County. }

In the County Court, August Term, A. D. 1899.

In the matter of the Organization of the Mineral Marsh Special Drainage District in the Counties of Bureau and Henry and State of Illinois.

To E. W. Lawton, Alonzo Collins and Scott Buswell, Drainage Commissioners of said Drainage District.

The undersigned having been employed by you to make all necessary surveys and estimates in reference to the costs and expenses of the construction of all necessary ditches and embankments and grades for the thorough drainage of the lands in said district, would respectfully report, as follows:

That in pursuance of your instructions and according to your directions I have made all necessary surveys and estimates of the costs of such improvements, and would report the following estimates, to wit:

1st. For the construction of one main ditch of about eight miles in length, and one shorter main ditch of about one and one-half (1½) miles in length, both main ditches to be of about a fifty (50) foot average width and of about eight (8) foot depth; and the necessary laterals of a number not yet ascertainable exactly, but comprising in all somewhere about nine (9) miles in length of ordinary dimensions otherwise, including costs of necessary surveying and engineering work and expenses, and the obtaining of necessary rights of way, about forty thousand (40,000) dollars.

2d. A large part of the work of constructing the necessary ditches, and especially the main ditches will be on lines and routes of old ditches now existing.

3d. The carrying out of the proposed work, as indicated in the maps and estimates by me made, to a completion will be of a great benefit to the lands in said district, and I estimate such benefit to be of twenty (20) dollars per acre on an average to all the lands in the said district, and those figures are the minimum benefit in my judgment.

I submit herewith a plat of the proposed work made as the result of my surveys, dated August 7th, 1899, and signed by me, and marked "Exhibit A," to give general information of the courses of the proposed main ditches, though the same is subject to some little changes.

Respectfully submitted, September 1st, 1899.

(signed) W. A. DARLING,
Civil Engineer.

Order for Final Organization.

STATE OF ILLINOIS, } ss.
Bureau County. }

In the County Court, September Term, A. D. 1899.

In the matter of the Organization of the Mineral Marsh Special Drainage District in Bureau and Henry Counties and State of Illinois.

And now on this eleventh day of September, A. D. 1899 said cause coming on to be heard upon the report of E. W. Lawton, Alonzo Collins and Scott Buswell, the commissioners heretofore appointed by the court in and by the order of the court entered in this proceeding July 5th, 1899, and thereby directed to report to the court on Tuesday, July 25th, 1899, at one o'clock in the afternoon of said day, and this cause on said last mentioned date having been continued by the order of the court then entered upon the written motion of said commissioners then filed and presented for the purpose until August 8th, 1899, at one o'clock p. m. of said day for further time to obtain necessary information on which to found their report, and on said last mentioned date this cause having again been continued by the order of the court then entered upon the written motion of the commissioners aforesaid then filed and presented for the purpose, showing their inability to properly report for want of necessary time to obtain the information and data on which to found their report, to and until September 1st, 1899, at one o'clock p. m. of said day, and on said last mentioned date, pursuant to the continuance of said cause from time to time as aforesaid, the said commissioners having come into court and filed and presented to the court their report in writing, including the report of their engineer to them, together with said engineer's map or plat marked "Exhibit A" referred to in said report, and thereupon the court having of its motion entered an order on said September 1st, 1899, that all parties owning lands in said proposed district and all parties interested, should file or make known objections and exceptions to said report and to said engineer's map filed therewith marked "Exhibit A," by September 11th, 1899, at one o'clock p. m. of said day, and said cause having been continued until said last mentioned date for the purpose of allowing and permitting such objections and exceptions to said report to be filed and made, and now on said last mentioned date, pursuant to said last continuance, come again into court, the said commissioners in person, and also by Geo. S. Skinner, their attorney, and also comes M. U. Trimble, guardian *ad litem* for Emma Rieder, a minor, the said Trimble being an attorney of this court and heretofore appointed and filed answer as such guardian *ad litem* for said minor, and it now appearing to the court that no person or party whatever has filed or made objection to the said report of said commissioners within the time given for the purpose as aforesaid, and the court having heard, read and made examination of said commissioners' report, and having heard the testimony of W. A. Darling, civil engineer, employed by said commissioners in and about their work, and of E. W. Lawton, Alonzo Collins and Scott Buswell, commissioners as aforesaid, each and all having been duly sworn and examined as witnesses in support of said report, and of the engineering work and map referred to in said report, and on motion of said commissioners leave being granted to them to file a supplemental map known as "Exhibit B" in correction of some minor details and more complete outlines of the ditches of said district, and the said supplemental map marked "Exhibit B" having been accordingly filed, and the court upon inspection of the said commissioners' report, and the engineer's report included therein, and the maps "Exhibit A" and "Exhibit B," and after hearing the testimony of said witnesses touching

the character, scope, expense, benefits and location of the work which will be involved to meet the prayer of the petition for said drainage district, and having heard the presentation of affairs concerning said district and the arguments of counsel in the case, and being now fully advised in the premises doth find, that the lands included in said proposed drainage district will be benefited for agricultural and sanitary purposes by the adoption and completion of a proper system of drainage for said lands; that the preliminary proceedings in this cause are all regular and in due form and that the court has full and complete jurisdiction of the subject-matter and of all the parties to this proceeding; that immediately upon the said commissioners being appointed by this court in and by its said order of July 5th, 1899, they, the said commissioners, E. W. Lawton, Alonzo Collins and Scott Buswell, duly qualified as such commissioners by taking the constitutional oath of office and thereupon at once proceeded to the examination of the lands in said proposed district, and went upon the lands included in said proposed district, and personally examined the same, and that the services of a competent civil engineer became necessary to aid the said commissioners in and about their work, and that they accordingly employed W. A. Darling, civil engineer, of Rock Island, Illinois, and that said W. A. Darling is such competent civil engineer, and that said civil engineer made such estimates and surveys as he was directed by said commissioners to make and reported the same to said commissioners together with said maps marked "Exhibit A" and "Exhibit B"; that said commissioners adopted said report of said civil engineer as a part of their said report to this court; that the necessary and proper drainage of said district will require a combined system of drainage by the construction of one main ditch of about eight (8) miles in length, and one shorter main ditch of about one and one-half (1½) miles in length, both main ditches to be of about fifty (50) foot average width and about eight (8) feet average depth, and several lateral ditches comprising in all about nine (9) miles of such lateral ditches of small and variable dimensions; that the estimated cost of constructing said main and lateral ditches including the obtaining the necessary rights of way therefor and the surveying and engineering expenses and work incident thereto is forty thousand (40,000) dollars, and that the other estimated costs and expenses, that is to say, the court costs, attorneys' fees, commissioners' compensation, printing and incidental costs and expenses is five thousand (5,000) dollars, or a total estimated cost of about forty-five thousand (45,000) dollars for the completion of the proper system of drainage for the lands of said district and carrying on the organization of the district to such time; that the lands in said district are low, wet and flat and require such a combined system of drainage and protection from wash and overflow for agricultural and sanitary purposes; that the construction of such a system of drainage, based on the estimates aforesaid, will greatly benefit the lands in said district and very materially increase their value; that the benefits to said lands and the increase in value thereof will greatly exceed the cost of the proposed work, and that the benefits to said lands and the natural increase in the value of said lands from the construction of such a proposed system of drainage as is contemplated and on the basis of the aforesaid estimates will be not less than twenty (20) dollars per acre throughout said district on an average, or an aggregate benefit to said lands as a whole of near about two hundred thousand (200,000) dollars, and that the case involves a system of combined drainage in four different townships, two of which are in Bureau County and two in Henry County, to wit: Alba Township, known as township seventeen (17) North Range five (5), and Annawan Township, known as township sixteen (16) North Range five (5), both in said

Henry County, and Gold Township, known as township seventeen (17) North Range six (6) and Mineral Township, known as township sixteen (16) North Range six (6), both the latter in said Bureau County, and all four of said townships being contiguous to each other, and situated East of the Fourth Principal Meridian, in the State of Illinois, and the court further finds that in order to obtain the proper outlet and necessary fall for the longer of said main ditches it will be necessary to go beyond the limits of the boundaries of said proposed district, a distance of one (1) mile or thereabouts for the purpose of constructing said ditch.

It is therefore ordered by the court that the said drainage district be, and the same is hereby finally organized as prayed for in said petition heretofore filed on June 6th, 1899, and presented to the court for the purpose, and that the following list of lands as designated by the abbreviated geographical descriptions in said petition, to wit,

(Sub-divisions)	Section	Township	Range	County	Number of Acres
NW ¼ NE ¼	4	16	6	Bureau	41.79

[Here follow other descriptions.]

comprising a total of (9878.68), nine thousand eight hundred and seventy-eight and 68-100 acres, and embracing and including the public highways within the limits of the territory covered by said lands and thus described, and also the right of way for the Illinois and Mississippi Canal running through a part of the above described lands within the limits of said territory, be and the same are hereby ordered and declared to constitute a drainage district to be known by the name and style of "The Mineral Marsh Special Drainage District in Bureau and Henry Counties and State of Illinois," and it is further ordered that the clerk of this court give notice of an election for the election of three drainage commissioners for said districts in the time and manner provided by the statute in such cases made and provided, to be held at the Buswell farm house in the Southeast quarter of section six (6), in Mineral Township in Bureau County, Illinois, being about one and one-half (1½) miles northwest of the Village of Mineral in said Bureau County, on Monday, October 2d, 1899, and that said above named commissioners heretofore appointed by the court proceed to conduct said election and to act as the judges and clerks thereof in the manner provided by law.

It is further ordered that the sum of five (5) dollars be and the same is hereby fixed as and for the guardian *ad litem* fees of the said M. U. Trimble, for his appearance at the hearing on said commissioners' report in behalf of the said infant, Emma Rieder, and that said sum be so taxed as costs in this proceeding by the clerk of this court.

(signed) RICHARD M. SKINNER,
County Judge of Bureau County, Illinois.

Notice for Election of Drainage Commissioners.

The legal voters and electors of "The Mineral Marsh Special Drainage District in Bureau and Henry Counties and State of Illinois," are hereby notified that an election for said District will be held at the Buswell farm house in the southeast quarter of section six (6) in Mineral Township, Bureau County, Illinois, being about one and one-half (1½) miles northwest of the Village of Mineral in said Bureau County, on Monday, October 2d, 1899, to elect three drainage commissioners

for said Drainage District. The polls of said election will be opened at the hour of ten (10) o'clock a. m., and closed at the hour of four (4) o'clock p. m. of said day.

(signed) WM. WILSON,

County Clerk of Bureau County, Illinois and *ex officio* Clerk of said Drainage District.

Proof of Posting Election Notices.

STATE OF ILLINOIS, } ss.
Bureau County. }

E. W. Lawton, being first duly sworn on his oath says that at the instance of William Wilson, county clerk of Bureau County, Illinois, and *ex officio* clerk of The Mineral Marsh Special Drainage District in Bureau and Henry Counties and State of Illinois, and in his behalf, he, said affiant, on the 19th day of September, A. D. 1899, being more than ten days prior to the election hereinafter referred to, posted five notices, of each of which the within notice is a true copy, in the following five public places in or near said drainage district, to wit: one in the post office in the Village of Mineral in Bureau County; one at the corner of the roads at the north quarter corner of section twenty (20) in Gold Township, Bureau County, Illinois; one in the post office in the Village of Annawan in Henry County, Illinois; one on the bridge in the road where it crosses Hickory Creek in section twenty-seven (27) in Alba Township, in Henry County, Illinois; and one in the grain office of J. Dewey in the Village of Annawan, in Henry County, Illinois. Besides posting like notices in several other public places in or near said drainage district, and that all of the notices thus posted as aforesaid by him were notices of an election of commissioners of said Drainage District at the time and place mentioned and set forth in the within notice, which is a true copy of all of said notices so posted.

(signed) E. W. LAWTON,

Subscribed and sworn to before me this 2d day of October, A. D. 1899.
(Seal) (signed) C. N. LESTER, N. P.

Report of Engineer upon a System of Drainage and Estimates.

To the Drainage Commissioners of The Mineral Marsh Special Drainage District in Bureau and Henry Counties and State of Illinois.

The undersigned, a civil engineer and surveyor, having been employed by you to make the necessary surveys, plans, maps, profiles, estimates, and also specifications for the Mineral Marsh Special Drainage District in Bureau and Henry Counties and State of Illinois, respectfully reports that his work on the lines aforesaid has been substantially completed, and that by way of reference for accurate and detail information on the result of his said work, he hereby makes special reference to the map of said district, showing all the lands in said district, the location of the several ditches and drains for said district, the names of the owners of the lands over which said ditches and drains will run, the names of the townships and all geographical descriptions of tracts and subdivisions of lands embraced in said district, which said map is marked for designation "Exhibit C" and made a part of this report; also a complete profile cut, plat or sheet, accurately indicating the depth, surface levels and the grade lines of all ditches and drains

for said district, the same being marked "Exhibit D" and likewise made a part of this report; also a map or plat of cross cuts showing the cross sectional dimensions of all the several ditches for said district, omitting the tile drains, marked "Exhibit E," and made a part of this report; and together with the aid of said commissioners, we formulated a set of specifications for the different ditches and drains for said district and all the work to be done therein, and reference is hereby also made to said specifications for such detail information as I recommend for said district in the construction of the ditches, drains and work. The data, including length and dimensions of the ditches to be dug, the number of stations into which the length of the ditch and drain work is divided of one hundred (100) feet each, the quantities of cubic excavations, the fall from point to point and throughout, are all given on the above mentioned exhibits. From the care and attention with which my work was done, and knowledge of the results from such drainage, I am confident that the completion of the system of drainage herein outlined according to the plans and specifications will effectually drain the lands of the district, and vastly increase the value of the land, in my judgment at least one hundred per cent on an average. I subjoin a table of estimates made by me for the work contemplated.

(signed) A. H. BELL,
Civil Engineer and Surveyor.

Princeton, Ill., January 30th, 1900.

ESTIMATES.

Main Ditch, exclusive of old ditch	525146	cubic yards	at 8 cts		$42011.68
Kink Creek Ditch	10666	" "	" 8 "		853.28
Coal Creek Ditch	47200	" "	" 8 "		3776.00
Elm Island Ditch	61155	" "	" 8 "		4892.40
North Ditch	151610	" "	" 8 "		12128.80
South Ditch, 0 to 27	24600	" "	" 8 "		1968.00
South Ditch, 27 to 96	58675	" "	" 8 "		4694.00
Goose Pond Ditch	18774	" "	" 8 "		1502.00
	897826	" "	" 8 "		$71826.16
Right of Way					6728.25
Engineering					2000.00
Court Costs					2000.00
Attorneys' Fees					2000.00
Commissioners' Pay					2000.00
Tile Drains					4067.00
Total					$90621.41

Tile Drain, "A"	$1095.00
Tile Drain, "B"	891.00
Tile Drain, "C"	1038.00
Tile Drain, "D"	1043.00
Total	$4067.00

Respectfully submitted,
(signed) A. H. BELL,
Civil Engineer and Surveyor.

Princeton, Ills., Jan. 30th, 1900.

Commissioners' Report Adopting System of Drainage.

Report of the determination of a system of drainage by the Drainage Commissioners of The Mineral Marsh Special Drainage District in Bureau and Henry Counties and State of Illinois.

To the Honorable Richard M. Skinner, Judge of the County Court of the County of Bureau in the State of Illinois:

The undersigned, Drainage Commissioners of The Mineral Marsh Special Drainage District in Bureau and Henry Counties and State of Illinois, respectfully report that after having been duly elected, and having duly qualified as Drainage Commissioners for said Drainage District, and as soon thereafter as practical, we went upon the land included in said drainage district, and together with the advice and assistance of A. H. Bell, a competent civil engineer and surveyor by us employed in and about such matters, determined upon a system of drainage for said district, answerable in our best judgments for the needs and demands of said district, which complete system showing all ditches and drains and all detail information pertaining to the making of the same, is fully set out and shown in the said engineer's report to us of this date together with the exhibits marked "Exhibit C," "Exhibit D" and "Exhibit E," accompanying the said engineer's report and made a part thereof and filed therewith.

The ditches shall be seven in number, known respectively as the "Main Ditch," "Kink Creek Ditch," "Coal Creek Ditch," "Elm Island Ditch," "North Ditch," "South Ditch," and "Goose Pond Ditch," and in addition there shall be four tile drains known and indicated as "A," "B," "C" and "D," and upon a careful examination and review of the work of said engineer, his plats, maps, profiles and estimates, we hereby adopt as and for the system of drainage for said district, the said engineer's report and exhibits made and formulated for that purpose, and we hereby declare as and for the system of drainage for said district, the ditches and drains thus outlined and identified and described as providing when constructed main outlets of ample capacity for the waters of the district, having in view the future contingencies as well as the present, and to that end we adopt the said "Exhibit C" as the map or plat of the district and together with said other exhibits as showing the work to be done therein, the said map showing with reasonable certainty the location of the proposed ditches and drains. And we hereby declare it our belief, founded upon such personal examination and the care taken in the discharge of our duties in that regard, that the construction and making of the several ditches and drains as specified and provided, when completed, will be of immense benefit to the lands of said district, and practically reclaim them, and make them capable of cultivation and production of good crops, and though the cost of the proposed work will be great, and larger than perhaps at first thought, we are satisfied when done, the benefits to the lands from said work of improvement will greatly exceed the cost, and that the said lands will increase in value from the improvement over one hundred per cent.

Princeton, Ills., Jan. 30th, 1900.

(signed) W. P. BAKER,
(signed) OTTO GINGRICH,
(signed) SCOTT BUSWELL,

Drainage Commissioners of The Mineral Marsh Special Drainage District in Bureau and Henry Counties and State of Illinois.

Specifications for Mineral Marsh Special Drainage District.

SPECIFICATIONS.

The work to be prosecuted under these specifications is situated in the Townships of Gold and Mineral in Bureau County and Alba and Annawan in Henry County—all in the State of Illinois.

The Drainage System consists of certain large ditches to be constructed by dredge-boat work, also a number of tile drains, all of which ditches and tile drains are specifically and technically described hereinafter. A plat of the above Drainage District accompanies these specifications, also profiles and cross-sectional views, all of which are hereby referred to and made a part of these specifications. The Plat shows the boundaries of the District; the location and bearings of the various ditches and drains, property owners, etc., etc., while the profiles give the surface elevation and depth of the same. The Cross-section Sheet gives their various cross-sectional dimensions. All elevations and grades are computed from one datum or base of elevation. All station stakes are set 100 feet apart and stakes are numbered in regular order, Station 0 being at whichever end of the ditch the survey commenced.

The bearings of the various ditches are determined from the Magnetic Needle, the declination of which was assumed to be 4° 35′.

MAIN DITCH.

The Main Ditch commences (at its upper end) in Section 34, Town 17, N. Range 6, E. of 4th P. M., 500 feet south of the north-west corner of the south-east quarter of the north-west quarter thereof; thence running S. 77° 35′ W. 9575 feet to the half-section line in Section 32 above Town and Range; thence S. 88° 25′ W. 1760 feet; thence N. 74° 45′ W. 4265 feet; thence S. 89° 15′ W. 3676 feet; thence N. 67° 30′ W. 6224 feet; thence N. 64° 15′ W. 5000 feet; thence N. 67° 20′ W. 1300 feet to the center of Section 27, Town 17 N. Range 5 East of the 4th P. M.; thence West along the South side of the half-section line 3700 feet; thence N. 36° 15′ W. 2146 feet; thence N. 77° W. 407 feet; thence S. 71° 30′ W. 427 feet; thence S. 55° 58′ W. 255 feet; thence S. 22° 15′ W. 592 feet; thence S. 15° 15′ W. 587 feet; thence S. 49° 15′ W. 266 feet; thence S. 74° 40′ W. 376 feet; thence S. 86° 35′ W. 995 feet; thence S. 80° 30′ W. 1413 feet; thence N. 75° 30′ W. 413 feet; thence N. 37° 30′ W. 441 feet; thence N. 85° 30′ W. 459 feet; thence N. 11° 45′ W. 787 feet; thence S. 72° W. 900 feet; thence N. 55° W. 500 feet; thence N. 11° 15′ W. 578 feet; thence N. 84° 25′ W. 722 feet; thence N. 62° 45′ W. 700 feet to the highway on the west line of Section 29, Town 17 North, Range 5, East of the 4th P. M., in Henry County. The ditch to be cut on the north side of the above described line.

It is intended in the above ditch known as the Main Ditch to follow the old channel of the present ditch in a general way, only deviating therefrom so far as may seem advisable in cutting off certain objectionable angles and corners.

The above ditch (Main) is to be 10 feet bottom width and 26 feet top width from Station 0 at upper end to the junction of the South Ditch, near the center of Section 32, Gold Township, from here to the junction of the Elm Island Ditch in Section 26, Alba Township, top width 45 feet, bottom 35 feet, from said junction at Elm Island Ditch to junction of North Ditch in center of Section 27, Alba Township, said ditch to be 50 feet top width, 40 feet bottom; from the center of said Section 27 on west to the outlet at the west side of Section 29, Alba Township, the above ditch is to be 55 feet top and 40 feet bottom width. The depth to be as shown on the profile of said Main Ditch, which is about 9½ feet average. The

total length of the ditch as staked out is 48,700 feet. So far as is practical and advisable the south bank of the old ditch to remain intact and the extra width cut from the north bank.

[Description of the remaining ditches follows.]

TILE DRAINS.

The following tile drains are to be laid to furnish outlets to the more remote portions of the District from the main ditches, viz.:

A 15-inch tile drain begins at the Main Ditch where the same crosses the section line between Sections 32 and 33 Town 17 N., R. 6 E., thence running north on the east side of the section line 1200 feet, thence N. 44° E. 2450 feet.

[Description of the remaining title drains follows.]

The above tile drains to be known as Tile Drains A, B, C, and D, respectively, and are so designated on the plat.

The tile are to be laid by experienced men and in a good and workmanlike manner. The depth is given on the profile. The grade as given by the Engineer in charge is to be carefully maintained throughout all tile lines by means of overhead cross sights. The grade and alignment are to be kept uniform and in accordance with the plans and directions of the Engineer of the Drainage District.

The tile is to be first-class drain tile, free from all serious defects and not less than 2-foot lengths. All tile trenches are to be back filled to the general surface of the ground.

GENERAL REMARKS.

In the construction of the Dredge Boat Ditches, a berm of 4 feet is to be left on both sides the ditch in all cases. The excavated material is to be cast about equally on each side of the ditches unless otherwise arranged and agreed upon by the Commissioners and Contractor interested; the ditches are to be cut to the dimensions as given in the profiles and cross-sectional plans of the same and the grade line maintained as nearly as is practical in dredge boat work. The slopes of the banks also to be constructed as therein shown as nearly as is practical in experienced dredge boat work. No work to be accepted until inspected by the Commissioners and Engineer of the District.

ESTIMATES.

Monthly estimates will be made upon the work completed and accepted by the Engineer in charge, the District retaining 10 per cent. of each estimate as a guaranty of the final completion of the entire work. The same to apply to either dredge boat or tile work.

Should there arise any question or difference of opinion as to the interpretation of these specifications the matter in question is to be referred to the Engineer of the Drainage District whose decision shall be final and conclusive.

ESTIMATE OF QUANTITIES.

Main Ditch, exclusive of old ditch	525146	cubic yards.
Kink Creek Ditch	10666	" "
Coal Creek Ditch	47200	" "
Elm Island Ditch	61155	" "

North Ditch	151610	cubic yards.
South Ditch, 0 to 27	24600	" "
South Ditch, 27 to 96	58675	" "
Goose Pond Ditch	18774	" "
Total	897826	cubic yards.

A. H. BELL, Civil Engineer and Surveyor.

W. P. BAKER,
OTTO GINGRICH,
SCOTT BUSWELL.

Commissioners of the Mineral Marsh Special Drainage District in Bureau and Henry Counties and State of Illinois.

January 30th, 1900.

Amendment to specifications in The Mineral Marsh Special Drainage District in Bureau and Henry Counties and State of Illinois.

EMBANKMENTS.

In the construction of the ditches of the District openings shall be left in the embankments for the inflow of surface waters wherever in the judgment of the Commissioners and the Engineer in charge such openings shall appear to be reasonably required for said purpose.

A. H. BELL, Civil Engineer and Surveyor.

W. P. BAKER,
OTTO GINGRICH,
SCOTT BUSWELL.

June 18th, 1900.

Commissioners of the Mineral Marsh Special Drainage District in Bureau and Henry Counties and State of Illinois.

Filed June 20th, 1900.

WM. WILSON,
County Clerk and *ex officio* Clerk of said Drainage District.

Affidavit of Nonresidence of Certain Defendants.

STATE OF ILLINOIS, }
Bureau County. } ss.

George S. Skinner, being first duly sworn on his oath says that he is the attorney for W. P. Baker, Scott Buswell and Otto Gingrich, Commissioners of The Mineral Marsh Special Drainage District in Bureau and Henry Counties and State of Illinois, and that for and in behalf of said commissioners he on this 23d day of May, A. D. 1900, filed with the clerk of the county court of Bureau County, Illinois, the petition or request of said commissioners for a venire for a jury to assess damages for right of way in the matter of said drainage district, and that among others who are made parties to said proceeding the following named persons are nonresidents of the State of Illinois, and that the residence and post office addresses of the said nonresident parties, as ascertained by this affiant in the exercise of diligence and due inquiry, are as set forth hereinbelow, the residence and post office address of each being set opposite his or her name respectively, as follows, to wit:

Emmi Talle Hunter — Marysville, Kentucky.

[Here list names.]

And that on diligent inquiry the address of Fred W. Gallander could not be ascertained and is now unknown to affiant, and affiant says that this affidavit is made for the purpose of causing due and proper notice to be given the said non-resident parties, and the said Fred W. Gallander.

(signed) GEORGE S. SKINNER.

Subscribed and sworn to before me this 23d day of May, A. D. 1900.

(signed) J. L. SPAULDING,
Notary Public.

(Seal)

Order Fixing Time of Hearing on Petition for Venire, etc.

STATE OF ILLINOIS, } ss.
Bureau County. }

In the County Court, May Probate Term, A. D. 1900.

In the matter of the Mineral Marsh Special Drainage District in Bureau and Henry Counties and State of Illinois.

On application or request for venire.

And now on this day come W. P. Baker, Scott Buswell and Otto Gingrich, Commissioners of The Mineral Marsh Special Drainage District in Bureau and Henry Counties and State of Illinois, by Geo. S. Skinner, their attorney, and file with the clerk of this court their petition and request for a venire for a jury to assess damages to E. W. Lawton, J. M. Curtis and others in the above entitled matter or proceeding now pending in this court, for certain rights of way required for ditches to be made in said district over on and across the lands therein owned and held by the several persons and parties therein set out, in accordance with the provisions of section fifty-seven (57) of an Act, entitled "An Act to provide for drainage for agricultural and sanitary purposes, and to repeal certain acts therein named," approved June 27th, 1885, in force July 1st, 1885, and all acts amendatory thereof, which petition is in words and figures as follows, to wit: [Here Clerk record petition], and the court having now examined into the subject-matter set forth in said petition and request, doth find that it is the duty of the court under the representations made and contained in said petition and the direction contained in said act to fix the time for the hearing on said petition, and the court further finds that said petition contains a general description of the lands and premises over or through which the rights of way is sought, and the name of the owner or owners thereof, the general course and direction of the rights of way sought and the amount of land required or proposed to be taken and occupied by the same.

It is therefore ordered by the court that Monday, June 18th, A. D. 1900, at the hour of 1:30 p. m. of said day, be and the same is hereby fixed as and for the time of the hearing on said petition, and the courthouse in the City of Princeton, Bureau County, Illinois, as the place where said hearing shall take place, and the clerk of this court is hereby directed to issue a venire for a jury of twelve disinterested land owners to appear at said time and place, and also to give notice by publication and also by causing notice to be served upon the owner or owners of the lands over which the rights of way is sought, as provided by the statute in such cases made and provided.

(signed) RICHARD M. SKINNER,
County Judge and Judge of the County Court.

Assessment Roll or Classification Table.

CLASSIFICATION.

The undersigned, Drainage Commissioners of The Mineral Marsh Special Drainage District in Bureau and Henry Counties and State of Illinois, having, immediately after their election and qualification as such commissioners, gone upon the lands in said drainage district and determined upon a system of drainage for said district, with the assistance of A. H. Bell, a competent civil engineer by us employed to locate and advise upon the character of the work to be done, which said system among other things provides main outlets of ample capacity for the waters of said district, having in view the future contingencies as well as the present, which said system of drainage so determined upon in form of our written report together with the maps, exhibits and papers pertaining thereto, were duly filed in the office of the County Clerk of Bureau County, who is *ex officio* clerk of said drainage district, and having thereupon and without delay and as soon as practicable thereafter gone upon and personally examined all the lands in said district, together with the highways therein, for the purpose of making a special assessment for benefits to said lands by classifying said lands, we did, in pursuance of law proceed and classify said lands in said drainage district in tracts of forty acres, more or less, according to the legal or recognized subdivisions on a graduated scale numbered according to the benefits to be received by the contemplated drainage thereof.

The tracts of land which will receive most and about equal benefits are marked one hundred (100) and such as were by us adjudged to receive a less amount of benefits were marked with a less number denoting its per cent. of benefits, which said classification so made we have caused to be properly tabulated as hereinafter set out, and we hereby authorize the same to be placed on file for reference and inspection and which, when confirmed, shall remain as a basis for such levy of taxes or assessments as may be needed for the lawful purposes of said drainage district, which said classification and the said tabulation thereof is hereby submitted as and for our classification of said lands, and is in the words and figures following, to wit:

Owners' Names	Description of Lands.					No. classification on scale
	Subdivisions	section	township	range E. of 4th P. M.	acres	
James Giltner	NW ¼ NE fr ¼	4	16	6	41.79	35.00.
Henry Reider.						
Robert Reider.						
Etc.						

And having also examined the public highways in said drainage district in each of the four towns of Mineral and Gold in Bureau County and Annawan and Alba in Henry County, in which townships said district is situated, for the purpose of determining the proportional part of the corporate taxes or assessments of said drainage district to be borne and paid by said towns according to the benefits to their

public highways respectively to be derived from and received by such drainage, we do hereby estimate the benefits to the entire drainage district, including the public highways therein in all four of said towns, at the sum of two hundred thousand (200,000.00) dollars; and we hereby also estimate the benefits to the public highways in the said town of Mineral, in said district, by the construction of the proposed ditches and work in said drainage district, at the sum of one thousand and twenty (1020) dollars; and we do hereby estimate the benefits to the public highways in the said town of Gold, in said district, by the construction of the proposed ditches and work in said drainage district, at the sum of one thousand, one hundred and twenty (1120) dollars; and we do hereby estimate the benefits to the public highways in the said town of Annawan, in said district, by the construction of the proposed ditches and work in said drainage district at forty (40.00) dollars; and we do hereby also estimate the benefits to the public highways in the said town of Alba, in said district, by the construction of the proposed ditches and work in said drainage district, at nine hundred (900) dollars; and further we do hereby set out and express the fractional figures expressing the ratio between the sum of the benefits for the whole district and the sum of the benefits to the public highways of each of said four towns, denoting and expressing the proportional part of the corporate taxes to be paid by assessment to the lands in said district, and to the public highways therein in each of the said four towns, respectively, as follows, to wit:

For the lands in said drainage district 9846
For the public highways of the town of Mineral 0051
For the public highways of the town of Gold.....0053
For the public highways of the town of Annawan.....0002
For the public highways of the town of Alba.....0045

And having it in doubt whether the lands constituting and embraced within the right of way for The Illinois and Mississippi Canal which runs through said drainage district are subject to assessment for benefits for agricultural and sanitary purposes by the proposed system of drainage within the purview of the act of the legislature under which these proceedings are conducted, and considering the impractical result of any such assessment, we have omitted from this classification any assessment of benefits to said right of way and any fractional figures to denote the ratio between the benefits thereto and the benefits to the whole district, and respectfully defer the ascertaining of benefits to said right of way from the proposed work, if any, to be determined by negotiations between the officers of this drainage district and the Government officers having in charge the construction of said canal, the amount to be realized thereon, if any, to be adjusted between the drainage district and the said towns upon the basis of the fractional figures expressing the ratio of benefits above set out, as proximate and equitable, said canal right of way having been considered in above classification of the lands through which it runs.

In witness whereof we, the said commissioners, have hereunto set our hands this 11th day of June, A. D. 1900.

(signed) W. P. BAKER,
(signed) SCOTT BUSWELL,
(signed) OTTO GINGRICH.

Drainage Commissioners of The Mineral Marsh Special Drainage District in Bureau and Henry Counties and State of Illinois.

Order of Commissioners Fixing Time of Hearing on Classification.

STATE OF ILLINOIS, }
Bureau County. } ss.

In the matter of the Classification of lands in The Mineral Marsh Special Drainage District in Bureau and Henry Counties and State of Illinois.

We, the undersigned, Drainage Commissioners of The Mineral Marsh Special Drainage District in Bureau and Henry Counties and State of Illinois, having this day filed our classification of the lands in said district in the office of the County Clerk of Bureau County, State of Illinois, which clerk is *ex officio* clerk of said Drainage District, it is hereby ordered that the time and place for the hearings of objections to said classification, be and the same is hereby fixed for Monday, July 9th, A. D. 1900, at the hour of 1:30 o'clock p. m. of said day, at the Court House in the City of Princeton in said Bureau County and said clerk is hereby directed to give notice thereof as required by law and the statute in such cases made and provided. All persons having objections to said classification are requested to have their objections in writing filed with said clerk by the time of hearing fixed as hereinabove stated.

(signed) W. P. BAKER,
(signed) OTTO GINGRICH,
(signed) SCOTT BUSWELL.

Drainage Commissioners of The Mineral Marsh Special Drainage District in Bureau and Henry Counties and State of Illinois.

Motion for Continuance.

STATE OF ILLINOIS, }
Bureau County. } ss.

In the County Court of Bureau County, June Term, A. D. 1900.

Scott Buswell,
W. P. Baker,
Otto Gingrich,
Drainage Commissioners Mineral Marsh Drainage District.
vs.
J. A. Schofield and others.

CONDEMNATION.

John A. Schofield, being duly sworn, on oath says he is one of the defendants in the above entitled cause and that he cannot safely and with justice to himself proceed to the trial of the above cause at this time for want of testimony material, proper, and competent and proper in said action and this deponent further saith that he is a nonresident of said county and proper written notice of the appointment of said Commissioners and all proceedings in said cause up to the present time, if properly mailed to him failed to reach him. Deponent hopes and expects to be able to proceed in the above cause in ten days and prays a continuance for that space of time, and that this application is not made for the purpose of delay but that justice may be done.

(signed) JOHN A. SCHOFIELD.

Subscribed and sworn to before me this 18th day of June, A. D. 1900.

(signed) WM. WILSON,
Co. Clk.

Notice to Nonresidents of Special Drainage Proceedings for Right of Way.

To Emmi Talle Hunter; Benjamin F. Thomas; Bessie B. Jones; George B. Jones; Susan Harrison; Theodore L. Harrison; The Philadelphia Trust Safe Deposit and Insurance Company; Susan Harrison, Theodore L. Harrison, and The Philadelphia Trust Safe Deposit and Insurance Company, trustees under the last will and testament of Joseph Harrison, Jr., deceased; T. Foohey; S. F. Gilman; and Fred W. Gallander.

You and each of you are hereby notified that a jury has been called to meet before the county judge of the county court of the County of Bureau, in the State of Illinois, at the Court House in the City of Princeton, in said County on Monday, the 18th day of June, A. D. 1900, at 1:30 o'clock P. M. for the purpose of assessing damages for right of way in the matter of The Mineral Marsh Special Drainage District in Bureau and Henry Counties and State of Illinois, when and where you can appear and assert your rights, if you desire.

(signed) WM. WILSON,
Clerk of the County Court of Bureau County, Illinois.

Appearance.

STATE OF ILLINOIS, }
Bureau County. } ss.

In the County Court, June Term, 1900.

In re Petition of Mineral Marsh Special Drainage District, etc., to condemn right of way.

I do hereby, with consent of all parties had and by permission of court, enter appearance of Hannah Mumford, Katie Kane, and Katie McCabe, and also with consent of counsel for J. A. Schofield.

(signed) S. W. ODELL, Atty.

Verdict of Condemnation Jury.

STATE OF ILLINOIS, }
Bureau County. } ss.

In the County Court, June Term, A. D. 1900.

W. P. Baker, Scott Buswell, etc.,
vs.
Emmi Talle Hunter; Benjamin F. Thomas, etc.

Petition to assess just compensation for damages for rights of way for ditches, etc.

We, the undersigned jurors impaneled in the above entitled cause to assess the just compensation for the lands sought to be taken by the said petitioners for the rights of way for the ditches to be constructed by them in said drainage district, and for lands damaged thereby, do hereby find and report to the court that said Emmi Talle Hunter, Benjamin F. Thomas, Bessie B. Jones and George B. Thomas, are entitled as just compensation for their lands described in the petition herein and sought to be taken by said petitioners for the construction of such ditches, to the sum of Five Hundred and Seventy-Eight and 55-100 dollars, and for damages to their other lands not taken, Fifteen Dollars, etc.

Judgment in Condemnation.

STATE OF ILLINOIS, }
Bureau County. } ss.

In the County Court, June Term, A. D. 1900.

W. P. Baker, Scott Buswell, and Otto Gingrich, Drainage Commissioners of The Mineral Marsh Special Drainage District in Bureau and Henry Counties and State of Illinois,

vs.

Emmi Talle Hunter; Benjamin F. Thomas, etc.

Petition to assess damages for right of way, etc.

Now come the said petitioners, the said Drainage Commissioners of The Mineral Marsh Special Drainage District in Bureau and Henry Counties and State of Illinois by Geo. S. Skinner and Jay L. Spaulding, their attorneys, and also come the defendants Sarah Harrison, Theodore L. Harrison and The Philadelphia Trust Safe Deposit and Insurance Company, trustees, Hugh White, Katie Kane, Katie McCabe and Hannah Mumford, by S. W. Odell, their attorney, and the defendant J. A. Schofield, by J. F. Bosworth and S. W. Odell, his attorneys, and the defendants Emmi Talle Hunter, Benjamin F. Thomas, Bessie B. Jones and George B. Thomas, S. F. Gilman and John McNeill not appearing either in person or by any one for them as their attorney, and the said petitioners as such drainage commissioners having on the 22d day of May, A. D. 1900, filed with the clerk of this court their petition or request for a jury to assess the just compensation for the lands sought to be taken by said petitioners as such commissioners for the right of way for certain ditches to be constructed by them in the said special drainage district and for lands damaged thereby, and due and proper service of notice of this proceeding having been had upon the said defendans J. A. Schofield, Hannah Mumford, Katie Kane, Katie McCabe, Hugh White and John McNeill by personal service of due and proper notice of the pendency of this proceeding upon each of them more than five days before the 18th day of June, A. D. 1900, the time heretofore on the filing of said petition or request fixed by the order of the court for the hearing on said petition, the said notices having been issued by the clerk of this court under the seal thereof and informing the persons to whom the same was addressed of the time and place when this case would be heard, and which notices were thus issued in the name of The People of the State of Illinois, and were served upon the said defendants, Hannah Mumford, Katie Kane, Katie McCabe and Hugh White by reading the same to them and at the same time delivering to him a true copy thereof on May 30th, 1900, and upon the said John McNeill by A. K. Haberer, Sheriff of Whiteside County, Illinois, by the delivery to him of a true copy of said notice on June 8th, 1900, and it appearing from the affidavit of George S. Skinner, filed on said May 23d, 1900, soon after the filing of the said petition, that the defendants Emmi Talle Hunter, Benjamin F. Thomas, Bessie B. Jones, George B. Thomas, Sarah Harrison, Theodore L. Harrison and The Philadelphia Trust Safe Deposit and Insurance Company, T. Foohey and S. F. Gilman are nonresidents of the State of Illinois, and stating their residences and post office addresses respectively, and they, and each of said nonresident defendants having been duly and properly notified of the pendency of this proceeding, as appears from the certificate of the publication of the like notice, being the notice provided to be given by the statute in such cases, in the Bureau County

Tribune, a weekly newspaper printed and published in Princeton, Bureau County, Illinois, of general circulation, for three successive weeks, once each week, the first insertion of said notice being in the issue of May 25th, 1900, and the last in the issue of June 8th, 1900, as appears from the certificate thereof of E. K. Mercer, publisher of said paper, on file in this proceeding, and the certificate of Wm. Wilson, clerk of the county court of Bureau County, Illinois, of date May 30th, 1900, showing the mailing of a copy of such published notice to each of said nonresident defendants on said May 30th, 1900, at the respective post office addresses given and stated in said affidavit in an envelope addressed to each at said address, sealed and postage prepaid, the said notices to the said nonresident defendants having thus been given by said clerk more than two weeks prior to the time of hearing fixed by the court on said petition and by its order as aforesaid, and on said time and at said place, to-wit, June 18th, 1900, at 1:30 o'clock P. M. of said day in the County Court rooms in the Court House in the City of Princeton in Bureau County in the State of Illinois, this cause coming on to be heard upon the said petition and pursuant to the giving of notice as aforesaid, and the parties appearing as aforesaid, and the defendants aforesaid, Emmi Talle Hunter, Benjamin F. Thomas, Bessie B. Jones, George B. Thomas, S. F. Gilman, and John McNeill having failed to appear either in person or by attorney, on motion of petitioners they were each three times solemnly called in open court to plead, answer or respond to said petition, and each failing to plead, answer, or respond, they and each of them defaulted by order of the court and the said petition taken as and for confessed by each of them, and the matters in controversy having been settled as to E. W. Lawton, J. M. Curtis and Fred W. Gallander, on motion of petitioners by order of court the said petition was dismissed as to said defendants E. W. Lawton, J. M. Curtis and Fred W. Gallander, and thereupon this cause proceeding to a hearing, on said 18th day of June, A. D. 1900, pursuant to the prayer of the petition or request in this proceeding and by order of the court heretofore entered in this behalf, a jury is impaneled in this cause to ascertain the just compensation and amount to be paid to the said Emmi Talle Hunter, Benjamin F. Thomas, Bessie B. Jones and George B. Thomas, and the just compensation and amount to be paid to the said Sarah Harrison, Theodore L. Harrison and The Philadelphia Trust Safe Deposit and Insurance Company, trustees, and the just compensation and amount to be paid to the said J. A. Schofield, and the just compensation and amount to be paid to T. Foohey, and the just compensation and amount to be paid to the said S. F. Gilman, and the just compensation and amount to be paid to the said Hannah Mumford, and the just compensation and amount to be paid to the said Katie Kane, and the just compensation and amount to be paid to the said Katie McCabe, and the just compensation and amount to be paid to the said Hugh White, and the just compensation and amount to be paid to the said John McNeill, for the lands to be taken and damaged in the taking of the strips or tracts for right of way for the ditches to be constructed over, in and through the lands held and owned by them in said drainage district, the description of the said lands, and the descriptions of the several portions of the right of way sought and required through the same being here set out in full as follows, to wit:

[Here insert description of lands.]

And upon the conclusion of the production and hearing of the evidence in the case, on motion of the petitioners, leave is granted to amend the petition to conform to the proofs in the case, and it is ordered that the said petition be, and the same is hereby amended to conform to the descriptions hereinabove contained of the

lands and premises and of the several and respective tracts required for right of way or portions thereof.

And the said jury consisting of twelve qualified landowners being first duly sworn in the manner and as required by law, after hearing the evidence, and inspecting the premises, and hearing the instructions of the court, on this 26th day of June, A. D. 1900, return into court their verdicts as follows: [Here the clerk will set out the verdicts]. And no good cause being shown to the court why judgment should not be entered upon said verdict;

It is therefore adjudged by the court that five hundred and seventy-eight and 55-100 (578.55) dollars is a just compensation to be paid by said drainage commissioners of the Mineral Marsh Special Drainage District in Bureau and Henry Counties and State of Illinois, to the said Emmi Talle Hunter, Benjamin F. Thomas, Bessie B. Jones, and George B. Thomas for their lands to be taken for the right of way for the ditches to be constructed as above described, and that fifteen (15) dollars is a just compensation for the damages to their other lands not taken; etc.

And it is further ordered and adjudged by the court that the said commissioners of The Mineral Marsh Special Drainage District in Bureau and Henry Counties and State of Illinois, shall on or before the first day of June, A. D. 1900, elect and determine whether or not they will abide by the awards of the jury and take possession of the said lands of the said Emmi Talle Hunter, Benjamin F. Thomas, Bessie B. Jones, and George B. Thomas, and the said lands of the said Sarah Harrison, Theodore L. Harrison and The Philadelphia Trust Safe Deposit and Insurance Company, trustees, and the said lands of the said J. A. Schofield, and the said lands of the said T. Foohey, and the said lands of the said S. F. Gilman, and the said lands of the said Hannah Mumford, and the said lands of the said Katie McCabe and the said lands of the said Katie Kane, and the said lands of the said Hugh White, and the said lands of the said John McNeill, for the right of way for said ditches, according to law, and if the said drainage commissioners of said district shall so elect to abide by said awards and take possession of the lands of said named defendants for such right of way, said commissioners shall on or before the said June 1st, A. D. 1902, or when such possession shall be taken, pay to the said defendants, Emmi Talle Hunter, Benjamin F. Thomas, Bessie B. Jones, and George B. Thomas and the said Sarah Harrison, Theordore L. Harrison, and The Philadelphia Trust Safe Deposit and Insurance Company, trustees, and the said J. A. Schofield, and the said T. Foohey, and the said S. F. Gilman, and the said Hannah Mumford, and the said Katie McCabe, and the said Katie Kane, and the said Hugh White, and the said John McNeill, or their proper representatives the amounts of the said awards of said jury respectively, that is to say, five hundred and ninety-three and 55-100 (593.55) dollars to the said Emmi Talle Hunter, Benjamin F. Thomas, Bessie B. Jones and George B. Thomas, or deposit the same with the county treasurer of Bureau County, for their use or their proper representatives, being the whole amount of the said award to them; and thirteen hundred and sixty-two and 90-100 (1362.90) dollars to the said Sarah Harrison, Theodore L. Harrison and The Philadelphia Trust Safe Deposit and Insurance Company, trustees, or deposit the same with the county treasurer of Bureau County for their use or their proper representatives, being the whole amount of the said award to them, etc.

It is further ordered and adjudged that the proper costs of this proceeding be taxed to and paid by the said drainage district.

(signed) RICHARD M. SKINNER,
County Judge and Judge of the County Court.

Objection to Classification.

In the matter of the Classification of the Lands of the Mineral Marsh Drainage District, in the Counties of Bureau and Henry, State of Illinois.
To the Honorable the Commissioners of said Drainage District:

The undersigned respectfully make objection to the classifications that you have placed upon their respective parcels of land, and allege that the same is unequal and unjust, and ask that the same be corrected in accordance with the intent of the law and the condition of said lands, and for more particular reasons they assign as follows:

[Here insert particular reasons.]

Notice for Drainage Contracts.

Sealed bids for the construction of the system of drainage in "The Mineral Marsh Special Drainage District in Bureau and Henry Counties and State of Illinois," will be received up to the hour of 12 o'clock M., July 2d, A. D. 1900, when the bids will be canvassed and the contracts let to the lowest and best bidder or bidders, by the undersigned commissioners. All proposals must be addressed to or left with William Wilson, County Clerk, Princeton, Illinois.

Said Commissioners reserve the right to reject any and all bids. Specifications will be furnished on application to said clerk.

W. P. BAKER,
OTTO GINGRICH,
SCOTT BUSWELL.
Commissioners of said District.

Princeton, Illinois, July 12th, 1900.

Contract.

This contract made and entered into this 3d day of July, A. D. 1900, by and between the undersigned Drainage Commissioners of The Mineral Marsh Special Drainage District in Bureau and Henry Counties and State of Illinois, party of the first part hereto, and Pollard Goff and Company, a corporation organized under the laws of Illinois, with main office at Champaign, Illinois, party of the second part; Witnesseth, that for and in consideration of the covenants and agreements of the party of the first part hereinafter mentioned and set forth, the party of the second part hereby covenants and agrees, in compliance with its bid made on July 2d, 1900, and this day accepted after modified by the said party of the first part, to construct, excavate and complete the entire system of open ditches as located and established in the said Drainage District at the date hereof, consisting of the Main Ditch, Kink Creek Ditch, Coal Creek Ditch, Elm Island Ditch, North Ditch, South Ditch and Goose Pond Ditch, including also the outlet to said Main Ditch below boundaries of the district to the terminus of said Ditch as now designated and shown on the plans and specifications for said district, the said ditches to be constructed and the work appertaining thereto to be done in accordance with the specifications, a copy whereof is hereto attached and hereby especially made a part of this contract, except in all cases the berm or space to be left between the edge of completed ditch and deposit of any considerable earth shall not be less than six (6) feet. The entire work hereby undertaken to be completed on or before April 1st,

A. D. 1902, and to be commenced by the party of the second part hereunder before or as soon after the levy or assessment to be made by the party of the first part is made to provide the means wherewith to pay the cost of said work to them.

And in consideration therefor, the party of the first part hereby covenants and agrees to pay to the party of the second part whatever sum the work shall amount to, to be computed at the rate of seven and one-half (7½) cents per cubic yard for the earth and material excavated and removed in accordance with the terms and provisions contained in the plans and specifications for said work, and this contract provision in regard to berm, such payment to be made on the estimates provided to be made in the specifications, except the first payment on said work shall be made by January 1st, 1901, providing if the moneys for such purpose or derived under the levy to be made by the party of the first part are had and available at an earlier date, then on estimates made the money then called for according to specifications shall then become due and payable to the party of the second part. And it is hereby understood and agreed by and between the parties hereto that in the event of the party of the first part being prevented from projecting any part of the system of ditches aforesaid by action of court, then this contract shall apply only to the remaining part, at the above mentioned rate. By the party of the first part is meant and hereby provided to include their successor or successors in office as such commissioners.

In witness whereof the parties hereto have hereunto set their hands and affixed their seals the day and year first above written.

(signed) POLLARD, GOFF & CO.,
By J. S. POLLARD, President
and TIMOTHY FOOHEY, Vice President.
(signed) M. A. GOFF.

(signed) W. P. BAKER,
(signed) OTTO GINGRICH,
(signed) SCOTT BUSWELL.

Commissioners of the Mineral Marsh Special Drainage District in Bureau and Henry Counties and State of Illinois.

Bond.

Know all men that we, Pollard, Goff and Company, a corporation, as principal, and J. S. Pollard, Timothy Foohey, Fr. Knollhoff, Louis Heckman, P. E. Heckman and M. A. Goff, as securities, all of the State of Illinois, are held and firmly bound unto the Drainage Commissioners of the Mineral Marsh Special Drainage District in Bureau and Henry Counties and State of Illinois, for the use of said district, in the sum of fifty thousand (50,000) dollars, lawful money of the United States for the payment of which well and truly to be made we bind ourselves our heirs successors, executors and administrators firmly by these presents.

Signed and sealed this 3d day of July, A. D. 1900.

The condition of the above obligation is such that whereas the above bounden Pollard, Goff and Company has this day entered into a contract with the said Drainage Commissioners of The Mineral Marsh Special Drainage District in Bureau and Henry Counties and State of Illinois to do certain things in the manner and on the terms therein specified and provided, to which contract this bond is attached; Now therefore if the above bounden Pollard, Goff and Company shall well and truly perform all and every of the conditions of such contract to be by them performed,

at the time and in the manner therein specified and provided and made certain, then this obligation to be void, otherwise to remain in full force and effect.

(signed) POLLARD, GOFF & Co.
By J. S. POLLARD, its President,
and TIMOTHY FOOHEY, its Vice President.
(signed) J. S. POLLARD,
(signed) TIMOTHY FOOHEY,
(signed) FR. KNOLLHOFF,
(signed) LOUIS HECKMAN,
(signed) P. E. HECKMAN,
(signed) M. A. GOFF.

(Seal)

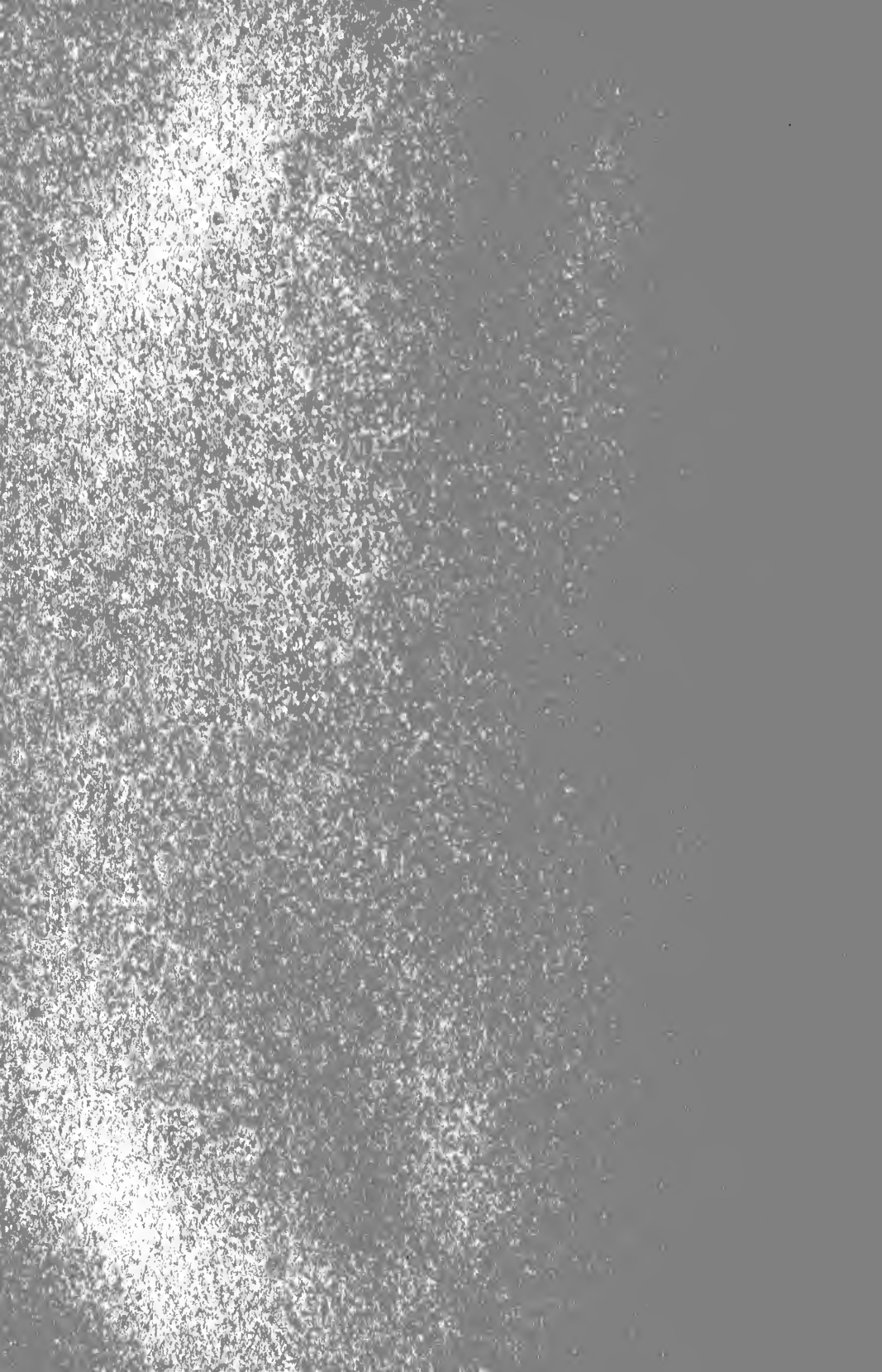
STATE OF ILLINOIS, }
Mason County. } ss.

I, James A. McComas, County Judge in and for said County, do hereby certify Fr. Knollhoff is personally known to me to be the same person whose name is subscribed to the foregoing instrument appeared before me in person this day and acknowledged that he signed, sealed and delivered the said instrument for the uses and purposes therein set forth.

Given under my hand and seal this 5th day of July, 1900.

(signed) JAMES A. MCCOMAS,
Co. Judge.

Copy of Specifications attached.



INDEX TO FORMS

ORGANIZATION OF SPECIAL DRAINAGE DISTRICTS.

INDEX TO NOTES

[Index to Cases follows this Index.]

INDEX TO CASES

[Points upon which there are annotations in the body of the work are followed by the word "Annotated" in parentheses. A separate index to the annotations precedes this.]

findings. Gladys City Oil, Gas & Manufacturing Co. et al. v. Right of Way Oil Co. et al., 1:499, — Tex. —, 137 S. W. 171.

6. Objection that the measure of damages for the conversion of oil is excessive in not allowing for the cost of extraction, held to come too late when presented for the first time in a petition for a rehearing. Gladys City Oil, Gas & Manufacturing Co. et al. v. Right of Way Oil Co. et al., 1:499, — Tex. —, 137 S. W. 171.

Estoppel to Assert Error.

7. A party cannot complain of the action of the trial court complying with his own request. Gladys City Oil, Gas & Manufacturing Co. et al. v. Right of Way Oil Co. et al., 1:499, — Tex. —, 137 S. W. 171.

Conflicting Evidence.

8. When there is a substantial conflict in the evidence upon which any finding of fact is based, such finding will not be reversed on appeal. Flynn Group Min. Co. v. Murphy, 1:619, 18 Idaho 266, 109 Pac. 851, 138 Am. St. Rep. 201.

Harmless Error.

9. The allowance of an amendment of an answer to a cross-complaint, denying specifically certain allegations, is, if erroneous, harmless where the original answer admitted the cross-complaint only so far as it was not inconsistent with the affirmative allegations of the answer. Duckworth et al. v. Watsonville Water & Light Co. et al., 1:128, 158 Cal. 206, 110 Pac. 927.

APPROPRIATION.

See Riparian Rights.
Injunction against interference, see Injunctions, 2.

Persons Entitled to Appropriate.

1. If the party seeks to claim water for irrigating agricultural land by appropriation, he must own the land sought to be irrigated or be an actual bona fide settler having a possessory interest. Avery v. Johnson, 1:531, 59 Wash. 332, 109 Pac. 1028. (Annotated)

2. The right of a squatter or speculator to claim the right of appropriation has not been recognized by custom nor sanctioned by statute. Avery v. Johnson, 1:531, 59 Wash. 332, 109 Pac. 1028.

3. A mere squatter can claim no right either as an appropriator or as a riparian proprietor. Avery v. Johnson, 1:531, 59 Wash. 332, 109 Pac. 1028.

After Grant of Riparian Rights.

4. A riparian owner under a former holder who had granted the riparian rights to another is not estopped from making an appropriation nor from enforcing his rights as appropriator against the grantee of the riparian rights, subject to the terms of the prior grant. Duckworth et al. v. Watsonville Water & Light Co. et al., 1:140, 150 Cal. 520, 89 Pac. 338.

Determination by Territorial Engineer.

5. Under the laws of 1907, c. 49, regarding the disposition of public waters, the territorial engineer is not, either by the express terms of the statute or by implication, restricted in rejecting an application to the ground that the project would be a menace to the public health or safety. Young v. Hinderlider, 1:338, 15 N. M. 666, 110 Pac. 1045. (Annotated)

6. The object of the statute is to secure the greatest possible benefit to the public from the public waters of the state. Young v. Hinderlider, 1:338, 15 N. M. 666, 110 Pac. 1045.

7. It is of public interest to protect investors against worthless investments by official approval of unsound enterprises. Young v. Hinderlider, 1:338, 15 N. M. 666, 110 Pac. 1045.

8. It is against public interest that an irrigation project receive official approval when the result would be the sale of land which could not be irrigated at the price of irrigated land. Young v. Hinderlider, 1:338, 15 N. M. 666, 110 Pac. 1045.

9. The mere fact of the cost of one irrigation project in excess of that of another is no ground for rejecting the first, but the cost should be taken into consideration in determining upon the granting or rejection of the application. Young v. Hinderlider, 1:338, 15 N. M. 666, 110 Pac. 1045.

10. The fact that one applicant is not a resident of the territory and that others are actual settlers, may be taken into consideration in determining the question of public interest, but should not outweigh all other considerations. Young v. Hinderlider, 1:338, 15 N. M. 666, 110 Pac. 1045.

11. That a subsequent application for approval of project for irrigation is better than a prior one, is no reason why the prior one should not be granted as to the land for which it is available or feasible. Young v. Hinderlider, **1:338,** 15 N. M. 666, 110 Pac. 1045.

12. The laws of 1907, providing that the territorial engineer shall have supervision of the apportionment of waters, etc., do not relate to waters held in private ownership or by prior appropriation, but only to public and unappropriated waters within the territory. Vanderwork (Territory of New Mexico, Intervener) v. Hewes et al., **1:351,** 15 N. M. 439, 110 Pac. 567.

Water Subject to Appropriation.

—— Running Stream.

13. Evidence of the intermittent overflow of a lake together with a slight flow into the lake in dry season is sufficient to support a finding that the lake with its tributaries and outlet constitutes a running stream subject to appropriation. Duckworth et al. v. Watsonville Water & Light Co. et al., **1:140,** 150 Cal. 520, 89 Pac. 338.

—— Drainage Water.

14. The purpose of draining one tract of land does not destroy the right to take water for the irrigation of other tracts. Lower Tulle River Ditch Co. v. Angiola Water Co., **1:280,** 149 Cal. 496, 86 Pac. 1081.

—— Seepage or Spring Waters.

15. Section 1 of Act of 1907, providing that all natural waters flowing in streams and water courses, whether such be perennial or torrential, within the limits of the Territory of New Mexico, belong to the public and are subject to appropriation for beneficial use, does not apply to seepage or percolating waters or spring waters appearing upon private lands from unknown causes. Vanderwork (Territory of New Mexico, Intervener) v. Hewes et al., **1:351,** 15 N. M. 439, 110 Pac. 567.

16. The territorial engineer's jurisdiction, with the exception of seepage water referred to in section 53, is limited to such public waters as are embraced in section 1. Vanderwork (Territory of New Mexico, Intervener) v. Hewes et al., **1:351,** 15 N. M. 439, 110 Pac. 567.

17. The term seepage waters, as used in section 53 of the Act of 1907, applies only to constructed reservoirs, ditches, etc. Vanderwork (Territory of New Mexico, Intervener) v. Hewes et al., **1:351,** 15 N. M. 439, 110 Pac. 567.

18. Section 53 of Act of 1907 has no application to seepage or spring water arising upon private lands from an unknown source. Vanderwork (Territory of New Mexico, Intervener) v. Hewes et al., **1:351,** 15 N. M. 439, 110 Pac. 567.

19. Seepage or spring water appearing upon land of private proprietor, is not subject to appropriation and distribution under the Laws of 1907, but any surplus remaining after the reasonable necessities of the proprietor of the land upon which the spring is situated and those of an adjoining owner to whom he has granted the right to use the waters, may be appropriated under the general law of appropriation of waters. Vanderwork (Territory of New Mexico, Intervener) v. Hewes et al., **1:351,** 15 N. M. 439, 110 Pac. 567.

20. Where seepage or spring water appears upon the land of a private proprietor, he has the right to the use thereof, and it is not required that he apply to the territorial engineer for permission to appropriate the same. Vanderwork (Territory of New Mexico, Intervener) v. Hewes et al., **1:351,** 15 N. M. 439, 110 Pac. 567.

21. The Washington statute (Ballinger's Ann. Code & Stats., § 4114; Pierce's Code, § 5829) which gives the owner of the land upon which the spring rises, the use of the water flowing therefrom, provided such owner can use the water upon his own premises, has no application to a spring having sufficient flow of water to form a water course. Hollett v. Davis, **1:415,** 54 Wash. 326, 103 Pac. 423. (Annotated)

—— Water on Indian Reservation.

22. No right of appropriation of waters on Indian reservation could antedate opening of reservation to settlement, and no such right could antedate actual bona fide settlement upon contiguous lands capable of being irrigated by the waters of a stream. Avery v. Johnson, **1:531,** 59 Wash. 332, 109 Pac. 1028.

Compliance with Statute.

23. The actual appropriation of water without compliance with the code provisions is enough to give the appropriator a right as against any one who did not have at the time of his diversion,

a superior right. Duckworth et al. v. Watsonville Water & Light Co. et al., **1:128,** 158 Cal. 206, 110 Pac. 927. (Annotated)

24. Actual appropriation without compliance with the code provisions cannot devest prior rights, but will be good as against a subsequent appropriator. Duckworth et al. v. Watsonville Water & Light Co. et al., **1:128,** 158 Cal. 206, 110 Pac. 927. (Annotated)

25. Compliance with the sections of the code relative to appropriation are important only in so far as the claimant seeks to have his rights relate back to the date of posting. Duckworth et al. v. Watsonville Water & Light Co. et al., **1:128,** 158 Cal. 206, 110 Pac. 927.

26. Compliance with code provisions will cut off rights accruing between the date of posting and the actual diversion for beneficial purposes. Duckworth et al. v. Watsonville Water & Light Co. et al., **1:128,** 158 Cal. 206, 110 Pac. 927.

27. Where no rights have intervened, actual appropriation may be made without following the provisions of the code. Duckworth et al. v. Watsonville Water & Light Co. et al., **1:128,** 158 Cal. 206, 110 Pac. 927.

28. Where no claim of any right accruing between posting of notice and actual diversion and use of water is made, failure to follow the code provisions is immaterial. Duckworth et al. v. Watsonville Water & Light Co. et al., **1:128,** 158 Cal. 206, 110 Pac. 927.

29. A person may by prior actual and completed appropriation and use, without proceeding under the code, acquire a right to the water for his beneficial use which will be superior and paramount to the title of one making subsequent appropriation from the same stream in the manner provided by the code. Lower Tulle River Ditch Co. v. Angiola Water Co., **1:280,** 149 Cal. 496, 86 Pac. 1081.

Notice.

30. A notice of appropriation which states that the water is to be used on certain described land and upon other land not described, to be conveyed in "a six-inch pipe or by a pipe of other dimensions" is sufficient to authorize use on the land described through a six-inch pipe. Duckworth et al. v. Watsonville Water & Light Co. et al., **1:140,** 150 Cal. 520, 89 Pac. 338.

31. In order to make a valid appropriation of water it is not necessary to post and record a notice of appropriation as provided in the Civil Code, as the method of acquiring the right to use the water as therein described is not exclusive. Lower Tulle River Ditch Co. v. Angiola Water Co., **1:280,** 149 Cal. 496, 86 Pac. 1081.

Conduction through Natural Channels.

32. A person who is making an appropriation of water from a natural source or stream is not bound to carry it to the place of use through a ditch or artificial conduit, or through a ditch or canal cut especially for that purpose. He may make use of any natural or artificial channel or natural depression which he may find available and convenient for that purpose, and his appropriation so made will, so far as such means of taking is concerned, be as effectual as if he had carried it through a ditch or pipe line made for that purpose and no other. Lower Tulle River Ditch Co. v. Angiola Water Co., **1:280,** 149 Cal. 496, 86 Pac. 1081. (Annotated)

Head Gates.

33. It is unnecessary that there should be any head gate of board or masonry at the place of diversion if a simple cut will accomplish the purpose. Lower Tulle River Ditch Co. v. Angiola Water Co., **1:280,** 149 Cal. 496, 86 Pac. 1081.

Priorities.

34. The law is thoroughly settled that as between two appropriators, the one first in time is first in right (per Shaw, J., concurring opinion). Duckworth et al. v. Watsonville Water & Light Co. et al., **1:128,** 158 Cal. 206, 110 Pac. 927.

35. It is an elementary law of appropriation of water for irrigation that the first appropriator is entitled to the quantity of water appropriated by him to the exclusion of subsequent claimants by appropriation or riparian ownership. Avery v. Johnson, **1:531,** 59 Wash. 332, 109 Pac. 1028.

Failure to Use.

36. If one co-owner elects to take less than the quantity of water to which he is entitled, one who has the right to use the ditch to convey waters in excess of the quantity to which the owners thereof are entitled is not in a position to complain. Carnes v. Dalton, **1:207,** — Or. —, 110 Pac. 170.

cost of construction and operation of the works, the productiveness of the land, and the other circumstances which show what the owners can afford to pay for water, must be taken into consideration. Young v. Hinderlider, **1:338**, 15 N. M. 666, 110 Pac. 1045.

CHATTEL MORTGAGES.

Distinguished from Conditional Sale.

Agreement that party does sell, assign, transfer and set over to another a certain quartz mill, providing that until the entire purchase price be paid, title shall remain in the seller, is a conditional sale and not a chattel mortgage, although it be provided that the seller may, at his option, enter upon and take possession of the mill, etc., and sell the same in case of default, crediting the proceeds after deducting expenses. Washburn v. Inter-Mountain Mining Co., **1:90**, — Or. —, 109 Pac. 382.

COAL LANDS.

Alaskan Entries.

1. The restrictions of section 2350, U. S. Revised Statutes, relating to entries upon coal lands held not to be imported into the act of April 28, 1904, relating to coal lands in Alaska, the latter act being subsequent and therefore paramount to the former. United States v. Munday et al., **1:722**, 186 Fed. 375.

2. The prohibitions and limitations of section 2350, U. S. Revised Statutes, held to apply to coal entries made in the district of Alaska under the act of April 28, 1904, the object and purpose of the latter act being to provide for a difference only in the mode of location, the time and manner of making final proof and the trial of adverse claims. United States v. Doughton, **1:736**, 186 Fed. 226.

3. A foreign corporation can not lawfully acquire or hold a coal claim in Alaska either in its corporate name or in the name of an agent or trustee. United States v. Munday et al., **1:722**, 186 Fed. 375.

4. One who opens or improves a coal mine in Alaska, locates a claim, marks its lines and corners, and posts and records a notice in accordance with the statute, and subsequently sells or mortgages the same is not a dummy entry man. United States v. Munday et al., **1:722**, 186 Fed. 375.

5. A locator of coal lands in Alaska has the right to sell or mortgage his claims before obtaining a patent and his vendee if a citizen of the United States or a group of citizens may receive the patent. United States v. Munday et al., **1:722**, 186 Fed. 375.

COLLATERAL ATTACK.

On organization of drainage district, see Drainage Districts, 17, 18.

COMMISSIONERS.

See Drainage, 33.

COMPROMISE.

Claimants of Public Lands.

A compromise between one asserting title under a mineral location and another claiming under an agricultural entry, whereby each received a part under his application, is not illegal or fraudulent. Murray v. White et al., **1:538**, — Mont. —, 113 Pac. 754.

CONDITIONAL SALES.

See Chattel Mortgages.
Status of property sold as fixtures, see Fixtures, 1, 2.
Mechanic's lien on property sold under condition, see Mechanics' Liens, 3.

CONSIDERATION.

See Contracts, 1.

CONSPIRACY.

See Criminal Law, 2, 3.

CONSTITUTIONAL LAW.

Delegation of Powers.

1. That the legislative power for local purposes may be delegated to minor municipalities, is a matter of universal recognition and constant practice. Ross v. Board of Supervisors of Wright County, **1:358**, 128 Iowa 427, 104 N. W. 506, 1 L. R. A. (N. S.) 431.

Conferring Judicial Powers.

2 Statute of 1905 (Sess. Laws 443, Hen. G. L., p. 374), creating the Sacramento Drainage District, containing lands situated in ten different counties, for the purpose of promoting drainage therein, providing for the election of commissioners with various duties and powers, for the levying of assessments on lands benefited to pay the cost of the reclamation thereof, and creating a

board of river control with powers for straightening and controlling the Sacramento and San Joaquin Rivers, is not unconstitutional. People ex rel. Chapman v. Sacramento Drainage District, 1:107, 155 Cal. 373, 103 Pac. 207.

3. The creation of a board of drainage commissioners, with *quasi* judicial powers, that is, to hear and determine objections to and to equalize assessments, is not unconstitutional. People ex rel. Chapman v. Sacramento Drainage District, 1:107, 155 Cal. 373, 103 Pac. 207.

Interstate Commerce.

4. A statute conserving the supply of natural gas of the State of Oklahoma by prohibiting interstate pipe lines, is unconstitutional as a violation of the interstate commerce clause. Charles West, Attorney General of the State of Oklahoma, App'lnt, v. Kansas Natural Gas Co. et al., 1:184, — U. S. —, 31 Sup. Ct. 564.

5. An Oklahoma statute withholding a charter, the right of eminent domain, and the right to use the highways of the state from corporations organized for the purpose of operating interstate pipe lines, held unconstitutional as discriminating and unreasonably burdening interstate commerce. Charles West, Attorney General of the State of Oklahoma, App'lnt, v. Kansas Natural Gas Co. et al., 1:184, — U. S. —, 31 Sup. Ct. 564.

Due Process of Law.

6. A drainage statute which provides for notice to the property owner at some stage of the proceedings before an assessment is made, is not open to constitutional objection simply because it does not provide for a new or additional notice of each successive step leading up to the assessment. Ross v. Board of Supervisors of Wright County, 1:358, 128 Iowa 427, 104 N. W. 506, 1 L. R. A. (N. S.) 431. (Annotated)

7. The act providing for adding lands "in the vicinity" to a drainage district without provision for notice to the owners thereof is void as a taking of the property added without due process of law, and void as to others to whom notice is given where the taking of the lands "in the vicinity" is such an essential feature of the scheme or plan sought to be effected that its elimination would lead to results not contemplated by the legislature. Ross v. Board of Supervisors of Wright County, 1:358, 128 Iowa 427, 104 N. W. 506; 1 L. R. A. (N. S.) 431. (Annotated)

8. Where an opportunity to be heard either before or after the levying of the assessment is given, there is no taking of property without due process of law. People ex rel. Chapman v. Sacramento Drainage District, 1:107, 155 Cal. 373, 103 Pac. 207.

9. Power to make a final determination beyond which there is no appeal must rest somewhere, and in the absence of express or clearly implied constitutional limitations upon its authority in this respect, the legislature may confide that power in any given proceeding to any court or commission, and if the interested party be given notice and has an opportunity to be heard, then if the finding is against him, no constitutional guaranty is violated by denying him the right of appeal. Ross v. Board of Supervisors of Wright County, 1:358, 128 Iowa 427, 104 N. W. 506, 1 L. R. A. (N. S.) 431.

10. Due process of law does not necessarily imply judicial procedure in a court of record or right of trial by jury. Ross v. Board of Supervisors of Wright County, 1:358, 128 Iowa 427, 104 N. W. 506, 1 L. R. A. (N. S.) 431. (Annotated)

Obligation of Contracts.

11. Obligation of contract is not impaired by a state changing its plans for the reclamation of overflowed lands, and creating new and different agents and mandatories. People ex rel. Chapman v. Sacramento Drainage District, 1:107, 155 Cal. 373, 103 Pac. 207.

Property Qualification of Voters.

12. A property qualification in order to be a voter at elections in drainage or reclamation districts does not violate a constitutional inhibition against requiring a property qualification for voters. The legislature permits the landowners to appoint their own agents, and the method which it imposes in making the selection is wholly within its own control. People ex rel. Chapman v. Sacramento Drainage District, 1:107, 155 Cal. 373, 103 Pac. 207.

Trial by Jury.

13. Provisions of the Illinois Drainage Act, providing for the assessment of damages by a jury or by commissioners, are unconstitutional and void. Hull v. Sangamon River Drainage District, 1:593, 219 Ill. 454, 76 N. E. 701.

CONTRACTS.

Impairment of obligation, see Constitutional Law, 11.

Consideration.

1. Evidence of discovery held sufficient to constitute the relinquishment of a placer claim a sufficient consideration for a contract. Murray v. White et al., 1:538, — Mont. —, 113 Pac. 754.

Legality.

2. A contract whereby one claimant agrees to procure a patent to certain land for the use of another in order to defeat a prior grant by that other, is not illegal nor against public policy. Murray v. White et al., 1:538, — Mont. —, 113 Pac. 754.

Construction.

3. A contract whereby one party agrees to pay one-half the expense of securing a patent to land held not to cover one-half of a contingent fee of $8,000 to the attorney assisting in procuring the patent. Murray v. White et al., 1:538, — Mont. —, 113 Pac. 754.

4. Under a contract for the sale of mining property providing that in case any ore is shipped from the property during a certain period the net proceeds shall be deposited to the credit of the vendors and applied in part payment, the term "net proceeds" is to be taken to refer merely to ore shipped to a mill or smelter for conversion and the deductions to be made are the deductions which in the ordinary course of business would be made at the smelter, including freight and smelting charges. Grobe v. Doyle, 1:664, 12 Brit. Col. 191.

CONVEYANCES.

Sufficiency of certificate of acknowledgment, see Acknowledgment.
Knowledge of corporation as to execution, see Corporations, 3.
Estoppel by deed, see Estoppel, 1-3.
Exceptions and reservations in patents, see Patents, 7, 8.
Deed of right of way to railroad as conveying oil and mineral, see Railroads, 4.

Construction.

1. The construction of a deed is governed by the intention of the grantor as gathered from the whole instrument. Gladys City Oil, Gas & Manufacturing Co. et al. v. Right of Way Oil Co. et al., 1:499, — Tex. —, 137 S. W. 171.

2. When a grantor first uses terms confined to a particular class and subjoins a term of general import, this term when thus used embraces only things *ejusdem generis*. Gladys City Oil, Gas & Manufacturing Co. et al. v. Right of Way Oil Co. et al., 1:499, — Tex. —, 137 S. W. 171.

3. The rule that the language of a deed should be construed against the grantor should be reversed where the deed is prepared by the grantee. Gladys City Oil, Gas & Manufacturing Co. et al. v. Right of Way Oil Co. et al., 1:499, — Tex. —, 137 S. W. 171.

4. The rule that the language of a deed should be construed against the grantor should not be applied until all other rules of construction fail. Gladys City Oil, Gas & Manufacturing Co. et al. v. Right of Way Oil Co. et al., 1:499, — Tex. —, 137 S. W. 171.

5. The term "right of way" ordinarily means an easement; but the use of additional words may widen it into a fee. Gladys City Oil, Gas & Manufacturing Co. et al. v. Right of Way Oil Co. et al., 1:499, — Tex. —, 137 S. W. 171.

Covenants.

6. A sale and conveyance of all right, title, and interest in property implies covenants of special warranty. Shaw v. Caldwell et al., 1:558, — Cal. —, 115 Pac. 941.

Exceptions and Reservations.

7. Evidence of annotations in official indexes, indicating an exception in a burnt deed, together with evidence of a custom of the railroad company grantor to make such exceptions and a portion of the deed supporting the contention, held sufficient to show a reservation of the mineral rights in land granted. J. R. Crowe Coal & Mining Co. v. Atkinson et al., 1:446, — Kan. —, 116 Pac. 499.

Operation and Effect.

8. Effect of conveyance by landowner of all riparian and water rights and privileges except for domestic uses and irrigation, and for stock, is to convey all water and water rights and privileges of every kind, character and description which apply or in any manner pertain to the land, except those reserved. Duckworth et al. v. Watsonville Water & Light Co. et al., 1:128, 158 Cal. 206, 110 Pac. 927.

CORPORATIONS.

Status of drainage district as corporation, see Drainage, 2.

Notice to and Knowledge of Officers and Agents.

1. A corporation is presumed to know the terms of an agreement made by its president and manager for its benefit. Washburn v. Inter-Mountain Mining Co., **1:90,** — Or. —, 109 Pac. 382.

2. To affect a director of a corporation individually, knowledge must be brought home to him and he is not presumed to know the terms of an agreement made by the president and manager of the corporation. Washburn v. Inter-Mountain Mining Co., **1:90,** — Or. —, 109 Pac. 382.

3. The fact that a deed was procured by the attorney for a railroad company and was delivered and remained in its custody, shows conclusively that the deed was taken with its knowledge and procurement. Gladys City Oil, Gas & Manufacturing Co. et al. v. Right of Way Oil Co. et al., **1:499,** — Tex. —, 137 S. W. 171.

COURTS.

Construction of State Statutes.

The federal courts will not consider the construction of statutes by state courts or the consistency thereof with the state Constitution, where made before any rights or burdens involved in the litigation were imposed. Chicago, B. & Q. R. Co. v. Board of Supervisors of Appanoose County, **1:459,** 170 Fed. 665.

COVENANTS.

See Conveyances, 6.

CRIMINAL LAW.

Federal Statutes.

1. The only crimes punishable under federal law are those defined by the laws enacted by congress. United States v. Munday et al., **1:722,** 186 Fed. 375.

Conspiracy.

2. The elements of the crime of conspiracy under U. S. laws are (1) an object which must be the commission of an offense against the United States to defraud the United States, (2) a plan of accomplishment, (3) an agreement for co-operation, (4) an overt act by a conspirator to effect the object of the conspiracy. United States v. Munday et al., **1:722,** 186 Fed. 375.

3. An indictment charging a conspiracy to defraud the United States by obtaining title to 5000 acres of coal land by means of 39 false, fraudulent and fictitious entries made by as many different persons ostensibly for their own use but in truth, etc., held to charge a crime under section 2350 of the Revised Statutes. United States v. Doughten, **1:736,** 186 Fed. 226.

DAMAGES.

See Drainage, 41-45.
Sufficiency of objection to present question of measure for review, see Appeals and Error, 6.

Measure for Flowing Lands.

Where the wrong is of a permanent nature and continuous, springing from the manner in which the ditch or channel is completed, on account of the diversion of surface water, the land of the abutting proprietor necessarily being injured by such diverted water, such proprietor may treat the act of the railway company as a permanent injury and recover his damages in the consequent depreciation of the value of his property, and in such case the recovery of the damage results in a consent on the part of such proprietor to such manner of maintaining such ditch or channel, concluding both him and any subsequent owner of such land. Chicago, Rock Island & Pacific Railway Co. v. Davis, **1:566,** 26 Okla. 434, 109 Pac. 214. (Annotated)

DECREE.

Enjoining interference with water, see Injunctions, 10.

DEEDS.

See Conveyances.
Sufficiency of certificate of acknowledgment, see Acknowledgment.
Estoppel by deed, see Estoppel, 1-3.

DISCOVERY.

As essential to location, see Location, 12-24.

DISTRICTS.

See Drainage, 25-32; Irrigation Districts.

DITCHES.

Use in General.

1. One entitled to use ditch only for purpose of conveying surface waters has no right to occasion injury to owners of ditch. Carnes v. Dalton, 1:207, — Or. —, 110 Pac. 170.

2. Owners of ditch are under no obligation to see there is water in canal to supply one whose right is only to use ditch to convey surplus waters. Carnes v. Dalton, 1:207, — Or. —, 110 Pac. 170.

Tenants in Common.

3. Each of several tenants in common of an irrigation ditch and dam is responsible in proportion to his interest therein for the maintenance and repair of the ditch, and in case of default of one or more the other has the right to make such repairs, for which the defaulting party becomes liable for his *pro rata*. But such failure does not justify a third party in making up the loss occasioned by the default by drawing off the water of the former. Carnes v. Dalton, 1:207, — Or. —, 110 Pac. 170.

4. One of the co-owners of a company ditch has a right of action against one having the right to use the ditch for conveying surplus waters, who causes a depletion of the waters to the injury of such co-owner. Carnes v. Dalton, 1:207, — Or. —, 110 Pac. 170. (Annotated)

5. In action by one co-owner of an irrigation ditch against a party diverting certain waters therefrom to his injury, the other co-owner is not a necessary party where there is no dispute as to the rights of the co-owners. Carnes v. Dalton, 1:207, — Or. —, 110 Pac. 170. (Annotated)

6. One tenant in common of a ditch or water right may institute a suit for unlawful interference therein by another tenant. Carnes v. Dalton, 1:207, — Or. —, 110 Pac. 170.

Over Public Lands.

7. The Act of Congress of February 15, 1901, providing for running telegraph lines, pipe lines, etc., through national parks and reservations, and the Act of March 3, 1891, providing for rights of way for irrigation ditches, etc., over public lands, are not inconsistent, and the later act does not repeal or modify the earlier. United States v. Lee, 1:479, 15 N. M. 382, 110 Pac. 607.

8. The Act of Congress of March 3, 1891, providing for rights of way for irrigation ditches, canals, etc., over the public lands of the United States, grants an easement which upon approval by the secretary of the interior, becomes permanent. United States v. Lee, 1:479, 15 N. M. 382, 110 Pac. 607.

9. The Act of Congress of February 15, 1901, providing for telegraph lines, pipe lines, etc., through national parks and reservations, grants merely a license, which may be revoked at any time. United States v. Lee, 1:479, 15 N. M. 382, 110 Pac. 607.

10. Irrigation ditches, canals, etc., may be constructed upon the unsurveyed public lands, and maps and plats thereof are not required to be filed until twelve months after survey. United States v. Lee, 1:479, 15 N. M. 382, 110 Pac. 607.

11. It is not necessary to secure the approval of the secretary of the interior before constructing irrigation ditches or canals upon the unsurveyed public lands which are not national parks or reservations, before construction can be made. United States v. Lee, 1:479, 15 N. M. 382, 110 Pac. 607.

12. The rights of settlers on the public lands cannot be adjudicated in a suit by the United States to restrain the maintenance of irrigation ditches on the public lands. United States v. Lee, 1:479, 15 N. M. 382, 110 Pac. 607.

Action to Determine Adverse Claims.

13. Where defendant insists upon the right to deplete the flow of water in a ditch and that his rights therein be adjudicated, an action is maintainable under B. & C. Comp., § 394, authorizing one claiming an interest adverse to plaintiff to be made a defendant. Carnes v. Dalton, 1:207, — Or. —, 110 Pac. 170.

DRAINAGE.

Duties of railroad as to drainage of surface water, see Railroads, 1, 2.
Levy of assessment against subsidiary railroad companies, see Railroads, 6.

Historical.

1. History of the establishment and development of reclamation or drainage districts in California. People ex rel. Chapman v. Sacramento Drainage District, 1:107, 155 Cal. 373, 103 Pac. 207.

Status of District as Corporation.

2. A reclamation district is not a municipal corporation or a corporation for municipal purposes within the prohibition of article 1, section 11, nor article 2, section 6, of the Constitution, but is a governmental agency to carry out a specific public purpose. People ex rel. Chapman v. Sacramento Drainage District, **1:107,** 155 Cal. 373, 103 Pac. 207. (Annotated)

Constitutionality of Statutes.

3. A statute authorizing the board of supervisors of a county to create a drainage district, appoint commissioners to classify the lands benefited, and assess the benefits, giving the owners notice of the time and place for hearing the report, after which levies are to be made to pay expenses, is consistent with the Constitution of Illinois. Chicago, B. & Q. R. Co. v. Board of Supervisors of Appanoose County, **1:459,** 170 Fed. 665. (Annotated)

4. A statute providing that a railroad company shall make a ditch or channel determined upon for drainage purposes across its right of way, the expense thereof being allowed the company as its damages, but that it shall be allowed no damage on account of bridges which it might be compelled to build, is not unconstitutional. Chicago, B. & Q. R. Co. v. Board of Supervisors of Appanoose County, **1:459,** 170 Fed. 665.

5. Statute of 1905 (Sess. Laws 443, Hon. G. L., p. 374), creating the Sacramento Drainage District, containing lands situated in ten different counties, for the purpose of promoting drainage therein, providing for the election of commissioners with various duties and powers, for the levying of assessments on lands benefited to pay the cost of the reclamation thereof, and creating a board of river control with powers for straightening and controlling the Sacramento and San Joaquin Rivers, is not unconstitutional. People ex rel. Chapman v. Sacramento Drainage District, **1:107,** 155 Cal. 373, 103 Pac. 207.

6. Provisions of the Illinois Drainage Act, providing for the assessment of damages by a jury or by commissioners, are unconstitutional and void. Hull v. Sangamon River Drainage District, **1:593,** 219 Ill. 454, 76 N. E. 701.

7. The creation of a board of drainage commissioners, with *quasi* judicial powers, that is, to hear and determine objections to and to equalize assessments, is not unconstitutional. People ex rel. Chapman v. Sacramento Drainage District, **1:107,** 155 Cal. 373, 103 Pac. 207.

8. Obligation of contract is not impaired by a state changing its plans for the reclamation of overflowed lands, and creating new and different agents and mandatories. People ex rel. Chapman v. Sacramento Drainage District, **1:107,** 155 Cal. 373, 103 Pac. 207.

9. A property qualification in order to be a voter at elections in drainage or reclamation districts does not violate a constitutional inhibition against requiring a property qualification for voters. The legislature permits the landowners to appoint their own agents, and the method which it imposes in making the selection is wholly within its own control. People ex rel. Chapman v. Sacramento Drainage District, **1:107,** 155 Cal. 373, 103 Pac. 207.

—— Due Process of Law.

10. Under a statute providing that lands may be added to a drainage district and taxed for drainage purposes, with no provision for notice to the owners thereof, the lands will be taken without due process of law. Ross v. Board of Supervisors of Wright County, **1:358,** 128 Iowa 427, 104 N. W. 506, 1 L. R. A. (N. S.) 431. (Annotated)

11. A drainage statute which provides for notice to the property-owner at some stage of the proceedings before an assessment is made, is not open to constitutional objection simply because it does not provide for a new or additional notice of each successive step leading up to the assessment. Ross v. Board of Supervisors of Wright County, **1:358,** 128 Iowa 427, 104 N. W. 506, 1 L. R. A. (N. S.) 431. (Annotated)

12. The provision of law that when a proceeding for establishing a drainage district has reached the stage where it is proposed to levy a tax, notice must be given the property-owners, is sufficient to avoid the constitutional objection against taking property without due process of law, although no notice is required of the creation of the district or the determination of the aggregate amount of the tax to be collected. Ross v. Board of Supervisors of Wright County, **1:358,** 128 Iowa 427, 104 N. W. 506, 1 L. R. A. (N. S.) 431.

13. Failure to provide for appeal from decisions of the board of supervisors creating a drainage district,

does not render the law unconstitutional when the parties affected have ample opportunity to be heard before the board. Denial of the right to an appeal from one court to another is not of itself a denial of due process of law. Ross v. Board of Supervisors of Wright County, 1:358, 128 Iowa 427, 104 N. W. 506, 1 L. R. A. (N. S.) 431. (Annotated)

14. The act providing for adding lands "in the vicinity" to a drainage district without provision for notice to the owners thereof is void as a taking of the property added without due process of law, and void as to others to whom notice is given where the taking of the lands "in the vicinity" is such an essential feature of the scheme or plan sought to be effected that its elimination would lead to results not contemplated by the legislature. Ross v. Board of Supervisors of Wright County, 1:358, 128 Iowa 427, 104 N. W. 506, 1 L. R. A. (N. S.) 431. (Annotated)

15. Where an opportunity to be heard either before or after the levying of the assessment is given, there is no taking of property without due process of law. People ex rel. Chapman v. Sacramento Drainage District, 1:107, 155 Cal. 373, 103 Pac. 207.

Curative Statutes.

16. Where an act for the formation of drainage districts provides for proceedings valid to a certain point, and void beyond that for want of provision for notice, the legislature may, by an amended act, cure the defect and validate the proceedings taken up to the point where the invalidity occurred. Ross v. Board of Supervisors of Wright County, 1:358, 128 Iowa 427, 104 N. W. 506, 1 L. R. A. (N. S.) 431.

17. The legislature has power by retroactive statute, to provide for notice to property owners whose lands were included in a drainage district, but who under the original statute were not entitled to notice by reason of which fact the original act was unconstitutional. Ross v. Board of Supervisors of Wright County, 1:358, 128 Iowa 427, 104 N. W. 506, 1 L. R. A. (N. S.) 431.

Powers of Legislature.

18. The legislature has the power to provide for the reclamation of overflowed land and to impose a tax thereupon in proportion to the estimated special benefits which those lands will receive from the work done. People ex rel. Chapman v. Sacramento Drainage District, 1:107, 155 Cal. 373, 103 Pac. 207.

19. To sustain such law it must appear that the character of the work is such that its performance confers some general benefit on the public as well as a private benefit on the landowner. People ex rel. Chapman v. Sacramento Drainage District, 1:107, 155 Cal. 373, 103 Pac. 207.

20. The legislature, having due regard to vested rights, may put all existing drainage or reclamation districts out of existence and create a board to manage all further reclamation. People ex rel. Chapman v. Sacramento Drainage District, 1:107, 155 Cal. 373, 103 Pac. 207.

21. The legislature has power to fix a district for the drainage or reclamation of lands, without any hearing as to benefits, for the purpose of assessing upon the lands within the district the cost of a local public improvement. People ex rel. Chapman v. Sacramento Drainage District, 1:107, 155 Cal. 373, 103 Pac. 207.

22. Whatever promotes the public health, safety, convenience, and welfare, limited to certain lines, is an exercise of the police power for which property can be taken without compensation, and expense and burdens be imposed without allowance of the equivalent by way of damages. Chicago, B. & Q. R. Co. v. Board of Supervisors of Appanoose County, 1:459, 170 Fed. 665.

23. The legislature of the state has jurisdiction over all overflowed lands in the state whether acquired under the Arkansas Act or by Spanish or Mexican grant. People ex rel. Chapman v. Sacramento Drainage District, 1:107, 155 Cal. 373, 103 Pac. 207.

Judicial Control.

24. Findings of a board of supervisors as to the necessity for a new channel for a stream for purposes of drainage, to the end that the public health, convenience, and welfare would be promoted, and as to the location, benefits, and depth and breadth of the new channel, are findings of fact with which the courts have nothing to do. Chicago, B. & Q. R. Co. v. Board of Supervisors of Appanoose County, 1:459, 170 Fed. 665.

Establishment of Districts.

—— Qualification of Petitioners.

25. Where a deed is signed and placed in escrow, the grantor is a proper party to sign a petition for a drainage district until such time as the deed

takes effect. Hull v. Sangamon River Drainage District, **1:593,** 219 Ill. 454, 76 N. E. 701.

26. A tenant for life who has also a contingent fee, together with children having a contingent remainder, are proper parties to sign petition for a drainage district. Hull v. Sangamon River Drainage District, **1:593,** 219 Ill. 454, 76 N. E. 701.

27. The drainage statute does not provide that petitioners should reside near the land proposed to be improved or be interested in the proposed improvement, but only that one hundred legal voters of the county should sign the petition in order to set the machinery of the law in motion. Seibert v. Lovell et al., **1:261,** 92 Iowa 507, 61 N. W. 197.

—— Withdrawal of Petitioners.

28. The jurisdiction of a board of supervisors to establish a drainage district vests upon the filing of the petition, and this cannot be ousted by attempted withdrawal of the petition after it is filed. Seibert v. Lovell et al., **1:261,** 92 Iowa 507, 61 N. W. 197. (Annotated)

—— Notice.

29. The division by the state of a part of its territory into districts for taxation for public improvements is a legislative matter, and the citizen affected thereby is not entitled to notice of the exercise of the power. Ross v. Board of Supervisors of Wright County, **1:358,** 128 Iowa 427, 104 N. W. 506, 1 L. R. A. (N. S.) 431.

—— Objections.

30. As a general proposition, no one is entitled to raise the objection that provision for notice to the interested parties is not made in a drainage statute except the parties entitled to the notice. Ross v. Board of Supervisors of Wright County, **1:358,** 128 Iowa 427, 104 N. W. 506, 1 L. R. A. (N. S.) 431.

31. A landowner who did not receive notice of the organization of a drainage district, but who voluntarily appeared in the proceedings for prosecution and allowance of claims for damages, waives the objection of failure of notice. Ross v. Board of Supervisors of Wright County, **1:358,** 128 Iowa 427, 104 N. W. 506, 1 L. R. A. (N. S.) 431.

Change of Boundaries.

32. Commissioners may change boundaries of a district from those given in the petition, provided petitioners represent a majority of the adult landowners of the land therein situated and representing one-third of the area. Hull v. Sangamon River Drainage District, **1:593,** 219 Ill. 454, 76 N. E. 701. (Annotated)

Commissioners.

33. Owning property within the district is not such an interest as disqualifies one from acting as commissioner of the district. People ex rel. Chapman v. Sacramento Drainage District, **1:107,** 155 Cal. 373, 103 Pac. 207.

Assessments.

34. In the matter of governmental power and control, the water highways of the state do not differ from the land highways, and legislation which exacts contributions from lands adjacent to the inland waterways stands upon the same ground as that which exacts similar contributions for land highways. People ex rel. Chapman v. Sacramento Drainage District, **1:107,** 155 Cal. 373, 103 Pac. 207.

35. The assessment for drainage may be made when the contract is let or the amount for which the drainage district is to be made liable is approximately ascertained, and need not be delayed until the work is completed. Ross v. Board of Supervisors of Wright County, **1:358,** 128 Iowa 427, 104 N. W. 506, 1 L. R. A. (N. S.) 431.

36. The drainage of swampy, marshy, and overflowed lands is a matter of public health, convenience, and welfare for which the legislature may provide, and distribute the expense among those who will be benefited as much or more than the amount assessed against them. Chicago, B. & Q. R. Co. v. Board of Supervisors of Appanoose County, **1:459,** 170 Fed. 665. (Annotated)

37. The finding of a board of supervisors that a new channel for a stream is necessary for purposes of drainage, which compels a railroad company to erect a new bridge within a mile of an old one, and assessing $10,000 for benefits from the drainage cannot, considered on the evidence, be held void. Chicago, B. & Q. R. Co. v. Board of Supervisors of Appanoose County, **1:459,** 170 Fed. 665.

38. If the owner makes no claim for damages to land no part of which is taken in excess of benefits, commissioners may assess such benefits. Hull v. Sangamon River Drainage District, 1:593, 219 Ill. 454, 76 N. E. 701.

39. Where a jury in eminent domain proceedings has found there were no damages to the land not taken, a verdict is not conclusive that there were no benefits. Hull v. Sangamon River Drainage District, 1:593, 219 Ill. 454, 76 N. E. 701.

40. It is only where no part of the land is taken, and the owner makes no claim for damages in excess of benefits, that assessment for benefits can be made by drainage commissioners. Hull v. Sangamon River Drainage District, 1:593, 219 Ill. 454, 76 N. E. 701.

Damages.

41. Compensation to be paid for land actually taken and damages to land not taken can only be determined by a jury, and after determining the just compensation for the land taken, the jury can only determine whether there is any damage to the lands not taken or how much the damage is by taking into account special benefits to the land. Hull v. Sangamon River Drainage District, 1:593, 219 Ill. 454, 76 N. E. 701.

42. On the question of damages to lands not taken, the jury is bound to consider the effect of the improvement upon the land, both advantages and disadvantages, and for the purpose of reducing or balancing damages, defendant would necessarily take into account any special benefits. Hull v. Sangamon River Drainage District, 1:593, 219 Ill. 454, 76 N. E. 701.

43. Such is not assessing benefits to the land, but merely ascertaining whether there is damage or not. Hull v. Sangamon River Drainage District, 1:593, 219 Ill. 454, 76 N. E. 701.

44. Commissioners cannot supplant a jury in determination of the question of damages, one of the questions necessarily involved in a proceeding under the Eminent Domain Act. Hull v. Sangamon River Drainage District, 1:593, 219 Ill. 454, 76 N. E. 701.

45. If commissioners can make an assessment of benefits to land a part of which is taken for public improvement, they can finally and conclusively determine a question which the owner has a constitutional right to have submitted to a jury. Hull v. Sangamon River Drainage District, 1:593, 219 Ill. 454, 76 N. E. 701.

ELECTIONS.

Validity of property qualification, see Constitutional Law, 12.

EMINENT DOMAIN.

Constitutionality of a statute permitting assessment of damages by commissioners, see Drainage, 6.

ENGINEER.

Powers and duties of territorial engineer as to appropriation of water, see Appropriation, 5-12.

ENTRY.

See Public Lands.

EQUITY.

Jurisdiction of accounting for waste, see Accounting.

ESTOPPEL.

Necessity of pleading facts, see Pleading, 3.

By Deed.

1. One conveying land with covenants of special warranty is estopped to set up any rights of ownership by virtue of a reservation in a former deed. Shaw v. Caldwell et al., 1:558, — Cal. —, 115 Pac. 941.

2. The grantee of one who has conveyed all his riparian and water rights to a third party is bound by such conveyance, and is estopped from asserting any rights in conflict with the rights so conveyed. Duckworth et al. v. Watsonville Water & Light Co. et al., 1:128, 158 Cal. 206, 110 Pac. 927.

3. By conveyance of all his water rights, riparian owner is absolutely estopped to use any part of water on land except as reserved in the conveyance. Duckworth et al. v. Watsonville Water & Light Co. et al., 1:128, 158 Cal. 206, 110 Pac. 927.

By Acquiescence.

4. Failure to enjoin or prevent the boring of a well on its right of way held not to show acquiescence in the claim of a railroad company to the oil underneath its right of way. Gladys City Oil, Gas & Manufacturing Co. et al. v. Right of Way Oil Co. et al., 1:499, — Tex. —, 137 S. W. 171.

5. Long continued acquiescence in the possession by a railway company of a right of way 200 feet wide held to estop the owner of the fee from denying the claimed width. Gladys City Oil, Gas & Manufacturing Co. et al. v. Right of Way Oil Co. et al., 1:499, — Tex. —, 137 S. W. 171.

EVIDENCE.

To show performance of assessment work, see Assessment Work, 4.
Burden of proof of fraud, see Fraud.

Expert and Opinion.

1. Opinion evidence as to whether a certain body of water was or was not a lake is inadmissible, the question being one which could be answered by any one properly informed regarding the definition of a lake and the facts and conditions surrounding the water, and therefore not a subject for expert testimony. Duckworth et al. v. Watsonville Water & Light Co. et al., 1:128, 158 Cal. 206, 110 Pac. 927.

2. The use of the words "to my own satisfaction" indicates a conclusion by the witness, and his testimony is properly excluded. Morgan v. Myers, 1:494, — Cal. —, 113 Pac. 153.

Declarations and Admissions.

3. Admissions by a prior holder in possession are competent to show the nature of the holdings of the grantee. Morgan v. Myers, 1:494, — Cal. —, 113 Pac. 153.

4. Declarations of a former owner are admissible against a subsequent holder only when made against interest by a grantor of the present holder while holding the title in controversy. Washoe Copper Co. v. Junila et al. (Hall et al., Interveners), 1:451, — Mont. —, 115 Pac. 917.

5. Declarations by one claiming under a placer claim and a quartz location, whereby he acknowledges the existence of a known lode upon the placer claim, held inadmissible to defeat the record title. Washoe Copper Co. v. Junila et al. (Hall et al., Interveners), 1:451, — Mont. —, 115 Pac. 917.

Location Certificate.

6. A declaratory statement (location certificate) which does not contain an affidavit is void, and the receipt in evidence of a certified copy is erroneous. Washoe Copper Co. v. Junila et al. (Hall et al., Interveners), 1:451, — Mont. —, 115 Pac. 917.

7. A copy of a declaratory statement (location certificate) offered to prove the extent of work by a former claimant, is objectionable as not the best evidence. Washoe Copper Co. v. Junila et al. (Hall et al., Interveners), 1:451, — Mont. —, 115 Pac. 917.

8. In an action to determine the rights of those operating on a lode within a placer claim, a copy of the declaratory statement of a prior location, since abandoned, is immaterial and inadmissible. Washoe Copper Co. v. Junila et al. (Hall et al., Interveners), 1:451, — Mont. —, 115 Pac. 917.

EXEMPTIONS.

From Taxation, see Taxation, 5, 6.

EXPLORATION.

Necessity of exploration within a reasonable time, see Leases, 6.

FIXTURES.

Conditional Sales.

1. Where mill is sold under condition that the title shall not pass until fully paid for, it remains personal property as between the seller and buyer although it be affixed to the realty. Washburn v. Inter-Mountain Mining Co., 1:90, — Or. —, 109 Pac. 382.

2. Mill affixed to soil under conditional sale is, as to third parties without notice, a fixture and will be treated as such so far as rights of third parties are concerned. Washburn v. Inter-Mountain Mining Co., 1:90, — Or. —, 109 Pac. 382.

Removal.

3. Machinery and fixtures placed on real estate leased for the purpose of drilling for gas and oil do not become permanent fixtures or part of the freehold, and the title thereto does not vest in the lessor upon a forfeiture of the lease. Perry v. Acme Oil Company, 1:99, 44 Ind. App. 207, 88 N. E. 859. (Annotated)

4. Where the right to remove property "at any time" has been expressly reserved in an oil lease, such right is not unlimited as to time, but is limited to a reasonable time after the expiration of the lease. Perry v. Acme Oil Company, 1:99, 44 Ind. App. 207, 88 N. E. 859.

FORFEITURE.

Necessity of pleading forfeiture of claim, see Pleading, 4.
Of leases, see Leases, 9-12.

FRAUD.

Burden of Proof.

One alleging fraudulent concealment in a contract, has the burden of showing that the fact concealed was material and that but for the concealment he would not have entered into the agreement. Murray v. White et al., 1:538, — Mont. —, 113 Pac. 754.

GAS.

Right of life tenant as to exploration for oil and gas, see Life Estates, 1, 2.
Construction of gas leases, see Leases, 2-5.

HEAD GATES.

As essential to appropriation, see Appropriation, 33.

HOMESTEAD.

Entry on for exploration for oil, see Oil Claims, 2.
Possession as essential to entry, see Public Lands, 2.

INDIAN RESERVATIONS.

Appropriation of waters on, see Appropriation, 22.

INDICTMENTS.

For conspiracy, see Criminal Law, 2, 3.

INJUNCTIONS.

Trial of Right to Possession.

1. One claiming the right to mine coal in lands held as to title and possession by another, may try that right by bill for injunction where the record shows clearly that the right of trial by jury was not infringed. J. R. Crowe Coal & Mining Co. v. Atkinson et al., 1:446, — Kan. —, 116 Pac. 499.

Interference with Water.

2. In action by reservoir company to restrain interference with its waters, it is no defense that a large volume of water existed at the source of supply available under another appropriation, to part of which, if so appropriated, defendants would be entitled. Hackett et al. v. Larimer & Weld Reservoir Company, 1:224, 48 Colo. 178, 109 Pac. 965.

Oil Well.

3. A bill to quiet title alleging in addition that the defendants have entered upon the land with a drilling rig and are threatening to drill for oil, is sufficient to warrant a temporary injunction against such trespass. Risch et al. v. Burch, 1:325, — Ind. —, 95 N. E. 123.

4. Statements of the danger of an adjoining operator's bringing in a salt water well, without evidence of his lack of skill or knowledge of the oil field, held insufficient to justify a temporary injunction. Simms v. Reisner et al., 1:238, — Tex. Civ. —, 134 S. W. 278.

Relocation.

5. Perpetual injunction held to lie against one attempting to locate a claim upon an existing one. Wheelden v. Cranston, 1:659, 12 Brit. Col. 489.

Right to Temporary.

6. The granting of a temporary injunction to maintain the *status quo* until final hearing, rests in the sound discretion of the trial court and will be justified where the evidence shows a case worth investigating. Risch et al. v. Burch, 1:325, — Ind. —, 95 N. E. 123.

Parties.

7. Appropriators of waters of a stream above the land of parties to the action are not necessary parties to determine question of injunction from defendants wrongfully diverting waters to plaintiffs' damage. Beck et al. v. Bono et al., 1:222, 59 Wash. 479, 110 Pac. 13.

8. Where sole question was whether plaintiff or defendant owned certain waters, irrigation company having no interest in the ownership thereof was neither proper nor necessary party to the action. Hackett et al. v. Larimer & Weld Reservoir Company, 1:224, 48 Colo. 178, 109 Pac. 965.

Pleading.

9. In action to restrain defendants from diverting water belonging to plaintiff, no question of priority of appropriation being involved, priority of rights of the parties by appropriation need not be alleged. Hackett et al. v.

Larimer & Weld Reservoir Company, 1:224, 48 Colo. 178, 109 Pac. 965.

Decree.

10. Decree is not objectionable in enjoining defendants from interfering with head gates or interfering with superintendent of irrigation company in discharge of duties at certain times, for reason that irrigation company was not a party to the action. Hackett et al. v. Larimer & Weld Reservoir Company, 1:224, 48 Colo. 178, 109 Pac. 965.

Appeals and Errors.

11. On apeal from an interlocutory order granting a temporary injunction, the sufficiency of the complaint will not be subjected to any technical tests when questioned first in the supreme court. Risch et al. v. Burch, 1:325, — Ind. —, 95 N. E. 123.

IRRIGATION.

See Ditches; Reservoirs.
Power to issue additional bonds, see Bonds, 2.
Reasonableness of charges for water, see Charges.

IRRIGATION DISTRICTS.

Petition for Organization.

1. Section 2 of the Laws of 1899, p. 408, as amended by Laws 1901, p. 191, § 1, requires the petition for the organization of an irrigation district to describe the boundaries of such district, but does not require the petition to contain a specific and accurate description of each tract or legal subdivision of land within the district. Oregon Short Line Railroad Company v. Pioneer Irrigation District et al., 1:1, 16 Idaho 578, 102 Pac. 904.

Notice.

2. Laws 1899, p. 408, § 2, as amended by Laws 1801, p. 191, § 1, does not require that the notice given of the presentation of the petition or the notice of the time when the same will be heard contain a description of the different tracts or legal subdivisions within the boundaries of the proposed district. Oregon Short Line Railroad Company v. Pioneer Irrigation District et al., 1:1, 16 Idaho 578, 102 Pac. 904.

3. The fact that the statute makes no provision for notice to the landowner that on a particular day the board of directors will assess benefits to the lands within the district will not render such statute unconstitutional, where the statute does provide for notice to be given of the proceedings to organize such district and notice of the hearing for the confirmation of the organization and proceedings, of such district, at which hearing the court is required to examine all the proceedings involved in the organization of such district including the assessment of benefits. Oregon Short Line Railroad Company v. Pioneer Irrigation District et al., 1:1, 16 Idaho 578, 102 Pac. 904.

Boundaries.

4. The statute of California authorizes the board of county commissioners to include within the boundaries of an irrigation district all lands which in their natural state would be benefited by irrigation and are susceptible of irrigation by one system; and this is true regardless of the question as to what particular use is being made of any particular tract or piece of land at the time the district is organized. Oregon Short Line Railroad Company v. Pioneer Irrigation District et al., 1:1, 16 Idaho 578, 102 Pac. 904. (Annotated)

5. Where it appears that an irrigation district has attempted to change the boundaries of such district so as to include other territory, but has failed to give the notice required by the statute of the intention of such district to change such boundaries, and the owners of land attempted to be taken into such district have no notice of the change in boundaries and the inclusion of such land within the district, such owners are not prevented from challenging the legality of the change in the boundaries of such district until they have had their day in court. (Sullivan, C. J., dissenting in part.) Oregon Short Line Railroad Company v. Pioneer Irrigation District et al., 1:1, 16 Idaho 578, 102 Pac. 904.

Assessments.

—— Property Subject.

6. Where territory has not been included within the boundaries of an irrigation district in accordance with the laws governing the taking of territory into an irrigation dstrict, the district has no power or jurisdiction to assess the property so included. Oregon Short Line Railroad Company v. Pioneer Irrigation District et al., 1:1, 16 Idaho 578, 102 Pac. 904.

7. In determining whether lands will be benefited by a system of irrigation works, the board of county commissioners is not limited to lands which will be used for agricultural purposes or upon which water will be beneficially used, or to lands devoted to any particular use; but the board is empowered and given jurisdiction to determine whether all lands within the district will be benefited, without reference to the use to which the same will be put. Oregon Short Line Railroad Company v. Pioneer Irrigation District et al., 1:1, 16 Idaho 578, 102 Pac. 904.

—— Sufficiency Generally.

8. If the records show that the board of directors, in levying an assessment for maintenance and to pay the bonded indebtedness of an irrigation district, substantially complied with the statute, and the assessment roll is made up in substantial compliance with the statute, the assessment thus levied will be upheld if the description of the property is sufficient to give the landowner notice that such property is burdened with such assessment. Oregon Short Line Railroad Company v. Pioneer Irrigation District et al., 1:1, 16 Idaho 578, 102 Pac. 904.

—— Determination of Benefits.

9. Section 11 of the act (Laws 1899, p. 414), as amended by Act March 18, 1901 (Laws 1901, p. 194, § 2), requires the board to examine all tracts and legal subdivisions within the boundaries of the district, and to apportion the benefits according to their judgment. Oregon Short Line Railroad Company v. Pioneer Irrigation District et al., 1:1, 16 Idaho 578, 102 Pac. 904.

—— Description of Tracts.

10. This provision of the statute, which requires the board to examine each particular legal subdivision or tract within the district and apportion the benefits, does not require the board, in designating the benefits, to particularly and specifically describe each tract or fractional part of such legal subdivision according to the separate ownership thereof where the benefits accruing to all parts of such legal subdivision are the same. Oregon Short Line Railroad Company v. Pioneer Irrigation District et al., 1:1, 16 Idaho 578, 102 Pac. 904.

11. If, however, in assessing the benefits, the board determine that any part or tract less than a legal subdivision be benefited differently from the remainder or any other part or tract, then the board is required to designate and describe the benefit to such particular tract or fractional part. Oregon Short Line Railroad Company v. Pioneer Irrigation District et al., 1:1, 16 Idaho 578, 102 Pac. 904.

12. The statute requires the board to assess benefits against each legal subdivision or tract within the district, and where less than a legal subdivision is benefited in a different degree or amount than the remainder of the legal subdivision or tract, then the board is required to fix and determine the benefits accruing to such particular tract; but where the entire legal subdivision or tract is benefited equally, then the board may lay the assessment against the legal subdivision, and thus include the smaller or fractional parts thereof. Oregon Short Line Railroad Company v. Pioneer Irrigation District et al., 1:1, 16 Idaho 578, 102 Pac. 904.

—— Listing According to Ownership.

13. The fact that the board of directors in assessing benefits to lands within an irrigation district, fail to list the lands according to each separate ownership, but do list the same according to each legal subdivision, does not show that the board did not intend to assess benefits to all of the lands within the legal subdivision. Oregon Short Line Railroad Company v. Pioneer Irrigation District et al., 1:1, 16 Idaho 578, 102 Pac. 904.

—— Failure to Include Property.

14. The fact that the officials of an irrigation district neglect to assess the right of way and station grounds of a railroad company for certain years is not a reason why such right of way and station grounds are not subject to assessment by said district; and the company cannot defeat a future assessment by reason of the fact that its property was not assessed for any particular year or years prior to the assessment made. Oregon Short Line Railroad Company v. Pioneer Irrigation District et al., 1:1, 16 Idaho 578, 102 Pac. 904.

—— Confirmation.

15. Section 19, Laws 1899, p. 418, empowers the district court upon the hearing for confirmation, to determine the legality and regularity of all

the proceedings taken with reference to the organization of said district and by such district up to the time the judgment of confirmation is rendered, including all proceedings affecting the legality or validity of the bonds issued by said district, and the apportionment of costs and the lists of such apportionment; and every person interested in said district is given an opportunity to appear and contest the same. Oregon Short Line Railroad Company v. Pioneer Irrigation District et al., 1:1, 16 Idaho 578, 102 Pac. 904.

16. Section 2 of the Act of March 18, 1901 (Laws of 1901, p. 194), amending the Laws of 1899 (Laws 1899, p. 414, § 11), expressly provides that "The proceedings of said board of directors in making such apportionment of cost, and the said list of such apportionment, shall be included, with other features of the organization of such district which are subject to judicial examination and confirmation, as provided in sections sixteen, seventeen, eighteen, nineteen and twenty of this act." Oregon Short Line Railroad Company v. Pioneer Irrigation District et al., 1:1, 16 Idaho 578, 102 Pac. 904.

—— Collateral Attack.

17. Where a railroad corporation owns right of way and station grounds within the boundaries of a proposed irrigation district, and quietly sits by and makes no objection or protest to the organization of such district or the confirmation of the same, such railroad company is concluded by the action of the board of county commissioners in including such right of way and station grounds within the district and by the judgment of the district court confirming such district, and cannot attack the jurisdiction of the district to assess such lands on the ground that the same were not benefited, in a collateral proceeding (following Knowles v. New Sweden Irrigation District, 16 Idaho 217, 101 Pac. 81). Oregon Short Line Railroad Company v. Pioneer Irrigation District et al., 1:1, 16 Idaho 578, 102 Pac. 904.

18. Whether the right of way and station grounds of a railroad company will be benefited by a system of irrigation works within an irrigation district is committed to the judgment of the board of county commissioners; and when such board has determined that such land will be benefited, and includes such land within the boundaries of such district, the action of such board is final and conclusive against a collateral attack. Oregon Short Line Railroad Company v. Pioneer Irrigation District et al., 1:1, 16 Idaho 578, 102 Pac. 904.

—— Railroad Property.

19. The mere fact that the railroad company for the time being is using its land for right of way and depot purposes is not a reason why such land will not be benefited by a system of irrigation works controlled by an irrigation district, as the question of benefits is to be determined with reference to the natural state and condition of the land and not with reference to the use being made of such land. Oregon Short Line Railroad Company v. Pioneer Irrigation District et al., 1:1, 16 Idaho 578, 102 Pac. 904.

20. The benefits fixed by the board are laid against the land, the proceeding is a proceeding *in rem*, and the benefits have reference to the land; and where the board in preparing a list of the lands against which benefits are laid, designates upon such list the legal subdivisions across which the right of way of a railroad company passes, and designates the rate per acre apportioned to each legal subdivision, it is a substantial compliance with the statute, and is not void because the right of way is not particularly and separately described. Oregon Short Line Railroad Company v. Pioneer Irrigation District et al., 1:1, 16 Idaho 578, 102 Pac. 904.

21. The list thus prepared is notice to the railway company of the benefits assessed against each legal subdivision, of which its right of way is a part; and where the list has been thus prepared, and no objection is made by the company on account of a defective description or want of description at the time of the hearing of the confirmation of said district. the owner of such property is concluded in a collateral attack by the judgment. Oregon Short Line Railroad Company v. Pioneer Irrigation District et al., 1:1, 16 Idaho 578, 102 Pac. 904.

22. The power and jurisdiction of the state board of equalization with reference to the assessment of railroad property has reference to assessments made for general state, county, and municipal purposes, and not to assessments made for local improvements. Oregon Short Line Railroad Company v. Pioneer Irrigation District et al., 1:1, 16 Idaho 578, 102 Pac. 904.

INTERSTATE COMMERCE.

See Constitutional Law, 4, 5.

JUDGMENTS.

Parties Affected.

1. Decree in action to determine interests in ditch affects only parties to that action, and owners of other interests are not bound thereby. Carnes v. Dalton, **1:207,** — Or. —, 110 Pac. 170.

2. Plaintiff is not bound by allegations in the pleadings in a suit for adjudication of water rights to which it was not a party, and plaintiff was not required to intervene therein. Hackett et al. v. Larimer & Weld Reservoir Company, **1:224,** 48 Colo. 178, 109 Pac. 965.

3. Plaintiff is not bound by decree fixing consumer's rights in action between him and irrigation company, to which it was not a party, and decree therein is no defense in action by plaintiff to restrain diversion. Hackett et al. v. Larimer & Weld Reservoir Company, **1:224,** 48 Colo. 178, 109 Pac. 965.

JURY.

Right to assessment of damages by jury, see Constitutional Law, 13.

LEASES.

Removal of fixtures, see Fixtures, 3, 4.
Listing for taxation, see Taxation, 1-3.

Distinguished from License.

1. The test to determine whether an agreement is a lease or a license is whether exclusive possession is given against all the world, including the owner, or whether a mere privilege to occupy under the owner is conferred. Shaw v. Caldwell et al., **1:558,** — Cal. —, 115 Pac. 941.

Construction.

2. In construing an oil and gas lease, the whole instrument, the situation of the parties, and the subject-matter of the contract will be considered together. Bellevue Gas & Oil Co. v. Pennell, **1:396,** 76 Kan. 785, 92 Pac. 1101. (Annotated)

3. A contract allowing to the plaintiff one-tenth portion of each prospective gas well, when utilized and sold off the premises, held not satisfied by an agreement with another party to convey and market the gas for 50 per cent. and the payment of 5 per cent. to the plaintiff. Barton et al. v. Laclede Oil & Mining Co., **1:259,** — Okla. —, 112 Pac. 965.

4. A provision in a lease "to pipe gas to the house for domestic purposes as soon as well is completed" construed to mean without charge for the gas. Bellevue Gas & Oil Co. v. Pennell, **1:396,** 76 Kan. 785, 92 Pac. 1101.

5. An oil and gas contract providing that in case no well is commenced within 120 days the grant shall become void unless the operator shall pay $20 each month thereafter delayed, held not to constitute a lease but to be a mere option for exploration, subject to expiration upon failure to pay in advance. Risch et al. v. Burch, **1:325,** — Ind. —, 95 N. E. 123.

6. A long term mineral lease is construed to imply a covenant for exploration within a reasonable time, and continued operation thereafter, notwithstanding an express provision for prospecting on adjacent territory within a year. Mansfield Gas Co. v. Alexander, **1:286,** — Ark. —, 133 S. W. 837.

Certainty.

7. A deed to prospect for oil and gas which does not specifically define the land granted is not void for uncertainty, but within certain limits gives the grantee the right to select the land, to the amount granted, upon which he may prospect. Perry v. Acme Oil Company, **1:99,** 44 Ind. App. 207, 88 N. C. 859.

Abandonment.

8. Temporary cessation of operations under an oil lease with the expectation to resume work when more oil has drained into the basin does not constitute an abandonment of the lease. Simms v. Reisner et al., **1:238,** — Tex. Civ. —, 134 S. W. 278.

Forfeiture.

9. Equity may declare a forfeiture of a mineral lease for breach of an implied covenant to explore and operate within a reasonable time. Mansfield Gas Co. v. Alexander, **1:286,** — Ark. —, 133 S. W. 837.

10. Oil and gas leases or contracts are not subject to the rule that forfeitures are not favored, and provisions looking towards a forfeiture are generally held to be for the benefit of the

landowner and clearly enforceable. Risch et al. v. Burch, **1:325**, — Ind. —, 95 N. E. 123.

11. The forfeiture clause in an oil lease is for the benefit of the lessor, and he may avail himself of it or not as he sees fit. If he does not declare a forfeiture, the lease remains in force, and the lessee may enter upon the leased premises. Perry v. Acme Oil Company, **1:99**, 44 Ind. App. 207, 88 N. E. 859.

12. The question of whether or not an oil lease has been surrendered or forfeited is not one to be decided on application for temporary injunction against operations by the lessee. Simms v. Reisner et al., **1:238**, — Tex. Civ. —, 134 S. W. 278.

Exhaustion of Mineral.

13. Lessee will not be required to pay the minimum royalty under a lease providing for production of a certain amount of coal "unless prevented from doing so by any unavoidable accident or occurrences beyond their control" where the coal has become exhausted. Bannan v. Graeff et al., **1:548**, 186 Pa. St. 648, 40 Atl. 805. (Annotated)

Under Canadian Statutes.

14. Where by Act of Legislature (Act of 1908, c. 11) the power was withdrawn from the Commissioner of Mines to receive applications for leases of areas situated within a specified territory, and in view of confusion and difficulties which had arisen with respect to the boundaries of leases within said territory, a survey was ordered, the court declined to make a declaration that there was vacant in the territory specified not covered by existing leases and open to application by the relator, or that defendant's lease exceeded the statutory limit. Per Meagher, J. (Townshend, C. J., concurring). Where a discretion is given to the court it will not be exercised where the result would be embarrassing. Per Russell, J. (in the judgment appealed from). A statutory power in respect to leases of crown lands must be strictly exercised. Attorney General v. Dominion Coal Co., **1:671**, 44 Nova Scotia 423.

15. The Dominion Coal Company, who were holders of a license to search for coal, covering an area of five square miles, made application under the provisions of the Mines Act, R. S., c. 18, § 194, for a lease of an area of one square mile of the land included within the boundaries of their license to search. The description in the application for the lease described the area applied for as situated at the southeast corner of the area originally licensed to M. and then westwardly, by the southern line of said lease, two miles. A question having arisen as to the exact location of the area under lease to M. and that applied for by the company, the commissioner of mines ordered a survey, as the result of which it was found that a portion of the lease granted to M. extended beyond the boundaries of his license to seach and included about one-half of the area applied for by the company. The commissioner under these circumstances declined to issue the lease applied for by the company, and directed the issue of a lease the boundaries of which were described in such a way as to exclude any portion of the area under lease to M. Held, by the majority of the court (adopting the opinion of Davies, J., in Drysdale v. Dominion Coal Co., 34 S. C. C. 332), that the matter was one involving a legal question upon which the commissioner had no right to pass; that no decision of his could either contract or expand the lease to M., and it was therefore his duty to have granted the application made by the company, excepting thereout such lands as might be found and determined to be included in the lease to M., leaving that question to be subsequently determined by the court in a proper action. Also, that the commissioner exceeded his powers in relation to the survey ordered by him, such power (§ 195), being confined to a survey of the tract of ground selected out of the area covered by the license to search, and giving no power to direct the survey and the preparation of a plan of another tract of ground. Also, that the commissioner exceeded his authority in permitting M. to go outside the boundaries of his license to search and include in his lease land already covered by a license to search issued to another party and assigned to the coal company. In re Dominion Coal Co., **1:704**, 42 Nova Scotia 108.

LEGISLATURE.

Powers of over drainage, see Drainage, 18-23.

LICENSES.

Creation.

1. A deed conveying one-half interest in a mine, with an agreement that the grantees may work said mine

at their own cost and divide all proceeds for a period of twenty years equally among the parties, is construed as creating only a license with respect to the half retained. Shaw v. Caldwell et al., 1:558, — Cal. —, 115 Pac. 941.

Revocation.

2. A license is a mere personal privilege not binding upon subsequent grantees, and consequently revoked by conveyance of the land. Shaw v. Caldwell et al., 1:558, — Cal. —, 115 Pac. 941.

3. The fact that a license is given by written instrument or by deed does not affect its revocability. Shaw v. Caldwell et al., 1:558, — Cal. —, 115 Pac. 941.

LIFE ESTATES.

Oil and Gas.

1. A life tenant has no right to grant the right of exploration for oil and gas and to profit from its discovery. Rupel et al. v. Ohio Oil Co. et al., 1:331, — Ind. —, 95 N. E. 225.

2. The owner of the reversion may enjoin the invasion of his right to oil and gas on his land. Rupel et al. v. Ohio Oil Co. et al., 1:331, — Ind. —, 95 N. E. 225.

Waste.

3. A reversioner may recover for waste from one claiming under the life tenant or from a stranger. Rupel et al. v. Ohio Oil Co. et al., 1:331, — Ind. —, 95 N. E. 225.

LOCATION.

Relation back of patent to date of location, see Patents, 3.
Conflict between location and town site patent, see Town Sites.

Lands Subject.

1. Mineral lands situated within railroad grants are subject to location as mining claims up to the time of the issuance of the patent to the railroad company. Van Ness v. Rooney et al., 1:270, — Cal. —, 116 Pac. 392.

Extent of Placer Location.

2. Five persons may, by means of proper association, make valid location of one hundred acres in one placer claim, but only where each acquires an interest not to exceed twenty acres. Nome & Sinook Co. v. Snyder, 1:202, 187 Fed. 385.

3. A placer location of one hundred acres, made by an association of five persons under an agreement whereby two of the parties were to receive only nominal interests and the others in unequal shares, is held void, and the ground declared unappropriated mineral land subject to location by others. Nome & Sinook Co. v. Snyder, 1:202, 187 Fed. 385.

Lodes in Placer Claim.

4. Where a known vein exists within the ground claimed in an application for placer, it remains public property of the United States. Washoe Copper Co. v. Junila et al. (Hall et al., Interveners), 1:451, — Mont. —, 115 Pac. 917.

5. In order to exclude a lode from a placer claim, the lode must have been known to the applicant or to the community in general at the time of application. Washoe Copper Co. v. Junila et al. (Hall et al., Interveners), 1:451, — Mont. —, 115 Pac. 917.

6. Where it is sought to exempt a particular lode from a placer claim, evidence of the character and extent of the lode as divulged by operations subsequent to the placer application, held competent. Washoe Copper Co. v. Junila et al. (Hall et al., Interveners), 1:451, — Mont. —, 115 Pac. 917.

Essentials.

—— In General.

7. The regulations prescribed by law to make a valid location of a mining claim in Alaska are: (1) Discovery of mineral upon or within the ground located; (2) marking of boundaries upon ground so that they may be readily traced; (3) recording of notice within ninety days from discovery. Charlton v. Kelly, 1:293, 2 Alaska 532. (Annotated)

8. The order in which acts of location are done is immaterial, provided they are all completed before rights of others have intervened. Charlton v. Kelly, 1:293, 2 Alaska 532.

9. It is not essential that discovery precede or coexist with demarcation of boundaries before recording of notice. Charlton v. Kelly, 1:293, 2 Alaska 532.

10. Until all three acts of location are performed, no title passes to claimant sufficient to maintain ejectment unless he has marked boundaries and recorded notice and is in actual possession, attempting in good faith to make discovery. Charlton v. Kelly, 1:293, 2 Alaska 532.

11. The law requires the locator to make his location so definite and certain that from the location notice and stakes and monuments on the ground the limits and boundaries of the claim may be ascertained, and so definite and certain as to prevent the changing or floating of such claim. Flynn Group Min. Co. v. Murphy, 1:619, 18 Idaho 266, 109 Pac. 851, 138 Am. St. Rep. 201. (Annotated)

—— Discovery.

12. Discovery subsequent to marking the boundaries and recording of notice perfects location unless bona fide rights have intervened. Charlton v. Kelly, 1:293, 2 Alaska 532.

13. Mere marking of boundaries and posting and recording of notice of location, give no title to locator, nor do they constitute possession. Charlton v. Kelly, 1:293, 2 Alaska 532. (Annotated)

14. Discovery is sufficient where the mineral found is such that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine, and the facts within the observation of the discoverer and which induce him to locate should be such as would justify a man of ordinary prudence, not necessarily a skilled miner, in the expenditure of time and money in the development of the property. Charlton v. Kelly, 1:293, 2 Alaska 532.

15. When controversy is between two mineral claimants, the rule respecting sufficiency of discovery is more liberal than when it is between a mineral claimant and one seeking to make an agricultural entry. Charlton v. Kelly, 1:293, 2 Alaska 532.

16. To constitute discovery, more than mere conjecture, hope, or even indications, is required. Charlton v. Kelly, 1:293, 2 Alaska 532.

17. Mere indications of mineral, however strong, are not sufficient to answer the requirement of the statute as to a discovery. Charlton v. Kelly, 1:293, 2 Alaska 532.

18. Indications of mineral should be considered as to whether it is in such quantity and under such circumstances and conditions as would justify a man of ordinary prudence, not necessarily a skilled miner, in expenditure of time and money in development of the property. Charlton v. Kelly, 1:293, 2 Alaska 532.

19. While the statute requires that discovery of mineral should be liberally construed in behalf of bona fide locators, the requirement cannot be ignored, and discovery must be of such substantial kind and character as would justify a man of ordinary prudence in expenditure of time and money to develop the property. Charlton v. Kelly, 1:293, 2 Alaska 532.

20. In determining the sufficiency of discovery, geological and natural conditions of the ground and the surrounding country should be considered. Charlton v. Kelly, 1:293, 2 Alaska 532.

21. Discovery of mineral is essential to the validity of mining claim. Zeigler v. Dowdy et al., 1:409, — Ariz. —, 114 Pac. 565.

22. A discovery of valuable mineral within the located boundaries is a prerequisite to a valid mineral location upon the public lands. Harper v. Hill et al., 1:585, — Cal. —, 113 Pac. 162.

23. No specific yield is necessary to constitute a placer nor is it required that the deposits of mineral shall be sufficiently extensive to pay operating expenses in order to maintain a valid placer claim. Murray v. White et al., 1:538, — Mont. —, 113 Pac. 754.

24. The finding of precious metals in quantity which justifies the expenditure of time and money with the reasonable hope of reward is sufficient to constitute a discovery. Murray v. White et al., 1:538, —Mont. —, 113 Pac. 754.

—— Notice.

25. Absolute technical strictness in the preparation of a notice of location is not required. Charlton v. Kelly, 1:293, 2 Alaska 532.

26. The object of notice of location is to prevent swinging of claim or change of boundaries, and to guide subsequent locator and afford him information as to extent of claim. Charlton v. Kelly, 1:293, 2 Alaska 532.

27. Under the provisions of section 3207, Rev. Codes, the location notice is not required to describe the exterior boundaries of the claim. Flynn Group Min. Co. v. Murphy, 1:619, 18 Idaho 266, 109 Pac. 851, 138 Am. St. Rep. 201.

28. Where it apears that a mining claim has been located in good faith, if by any reasonable construction the language used in the location notice describing the claim and referring to natural objects and permanent monuments imparts knowledge of the location of such claim to a subsequent locator, it is sufficient. Flynn Group Min. Co. v. Murphy, 1:619, 18 Idaho 266, 109 Pac. 851, 138 Am. St. Rep. 201.

—— Marking on Ground.

29. Claim must be so distinctly marked upon the ground that boundaries can be readily traced. Charlton v. Kelly, 1:293, 2 Alaska 532.

30. Setting stakes at each corner of a claim and at the center of end line is not necessarily a proper marking. Charlton v. Kelly, 1:293, 2 Alaska 532.

31. What is a proper marking may depend upon the topography of the ground and surrounding circumstances. Charlton v. Kelly, 1:293, 2 Alaska 532.

32. What is a sufficient marking of the boundaries is a question of fact for the jury. Charlton v. Kelly, 1:293, 2 Alaska 532.

33. Stakes set at each corner of the claim, with center stake at each end, with reference to some other natural object or permanent monument in the locality, such as another well-known claim, is a sufficient compliance with the requirements of the statute. Charlton v. Kelly, 1:293, 2 Alaska 532.

34. Under the provisions of section 3207, Rev. Codes, the locator of a mining claim is required to erect a monument at the place of discovery upon which, among other things, he must place the distance claimed along the vein each way from such monument. Flynn Group Min. Co. v. Murphy, 1:619, 18 Idaho 266, 109 Pac. 851, 138 Am. St. Rep. 201.

—— Possession.

35. The rule that actual possession is not necessary to protect one's title to a claim held under a mining location applies only when the location has been completed by a discovery of valuable mineral. McLemore v. Express Oil Co., 1:232, — Cal. —, 112 Pac. 59.

36. A mining claim is possessed by marking boundaries, recording, and making discovery of mineral, etc.; a residence on the claim is not required. Charlton v. Kelly, 1:293, 2 Alaska 532.

37. Merely placing tent, tools, and small supply of provisions on a claim does not alone constitute possession thereof. Charlton v. Kelly, 1:293, 2 Alaska 532.

38. Mere casual visits to ground and leaving thereon, unused, tents, tools, and provisions, does not constitute actual possession. Charlton v. Kelly, 1:293, 2 Alaska 532.

Mistaken Location of Apex.

39. One who locates a mining claim in good faith is protected in his possession of the surface marked out, although subsequent developments show his location of the apex of the vein to have been erroneous. Harper v. Hill et al., 1:585, — Cal. —, 113 Pac. 162.

Excessive Location.

40. Where the boundaries of a claim are made excessive in size, with fraudulent intent, it is void; or, if so large as to preclude the presumption of innocent error, fraud will be presumed. Flynn Group Min. Co. v. Murphy, 1:619, 18 Idaho 266, 109 Pac. 851, 138 Am. St. Rep. 201.

41. Held that where a location notice states that the mining claim which it describes extends seven hundred feet in a northwesterly direction and eight hundred feet in a southeasterly direction along the lode, a locator may go to the point of discovery of such claim and measure the ground from the discovery point eight hundred feet in a southeasterly direction along the lode, and if there be any unlocated ground beyond that eight hundred feet, may legally locate it, regardless of the fact that the easterly end stakes had been established beyond the eight hundred feet. Flynn Group Min. Co. v. Murphy, 1:619, 18 Idaho 266, 109 Pac. 851, 138 Am. St. Rep. 201.

42. The case of Nicholls v. Lewis & Clark Mining Co., 18 Idaho 224, 109 Pac. 846, cited and approved, and the case of Atkins v. Hendree, 1 Idaho 95, cited and disapproved, so far as it holds that no fraud can be perpetrated where

there exists the means of ascertaining or discovering the fraud. Flynn Group Min. Co. v. Murphy, **1:619,** 18 Idaho 266, 109 Pac. 851, 138 Am. St. Rep. 201.

43. A placer claim location exceeding the statutory twenty acres does not render the entire claim void; it is void as to excess only. Zimmerman et al. v. Funchion et al., **1:437,** 89 C. C. A. 53, 161 Fed. 859. (Annotated)

44. The prior locator in actual possession of a placer claim which exceeds the legal limitation, and diligently working the same in good faith, may select what portion of the claim he will discard as excess (following McIntosh v. Price, 121 Fed. 716, 58 C. C. A. 136). Zimmerman et al. v. Funchion et al., **1:437,** 89 C. C. A. 53, 161 Fed. 859.

45. Where the prior locator, who is not in actual possession of the claim containing an excess over the legal limitation, knowingly refuses or neglects to draw in his lines to the legal limit, any other prospector may take the excess within another location from any part of such prior excessive location (raised but not decided). Zimmerman et al. v. Funchion et al., **1:437,** 89 C. C. A. 53, 161 Fed. 859.

Operation and Effect.

46. A subsequent valid location of a mining claim in this state cannot be made on mineral land that is already covered by a valid location. Flynn Group Min. Co. v. Murphy, **1:619,** 18 Idaho 266, 109 Pac. 851, 138 Am. St. Rep. 201.

47. Where a discovery is made on a vein of mineral bearing rock, and the notice provides that such claim extends several hundred feet in a northwesterly direction and eight hundred feet in a southeasterly direction from such discovery, and the corner stakes on the southeasterly end are so placed as to take in more than eight hundred feet of such vein, subsequent locators may legally locate the excess of ground, as the first location is void only to the extent of eight hundred feet southeasterly from the point of discovery on said claim. Flynn Group Min. Co. v. Murphy, **1:619,** 18 Idaho 266, 109 Pac. 851, 138 Am. St. Rep. 201.

48. A mining location secures a good title in the locator, without a patent, so long as there has not been a subsequent location based on his failure to do assessment work. Van Ness v. Rooney et al., **1:270,** — Cal. —, 116 Pac. 392.

49. A locator who has marked boundaries and recorded notice and entered into actual possession for the purpose of making discovery, is entitled to possession so long as he remains in actual possession, engaged in good faith in labor of making discovery. Charlton v. Kelly, **1:293,** 2 Alaska 532.

Relocation.

50. One claiming under a relocation is precluded from denying the validity of the prior location. Zeiger v. Dowdy et al., **1:409,** — Ariz. —, 114 Pac. 565.

51. One who has abandoned an attempted relocation and claims the land merely as an occupant is not estopped to deny the validity of the prior location. Zeiger v. Dowdy et al., **1:409,** — Ariz. —, 114 Pac. 565.

52. Held, that the locator had actual notice that the ground in controversy had been located, as well as constructive notice by an examination of the recorded notice, and that no technicalities will be resorted to to sustain his relocation of the same ground. Flynn Group Min. Co. v. Murphy, **1:619,** 18 Idaho 266, 109 Pac. 851, 138 Am. St. Rep. 201.

Under Canadian Statutes.

53. Formal notice of abandonment of placer "creek claim" with attempted location under act then repealed held not necessary to a valid location under Act of 1901. Wheelden v. Cranston, **1:659,** 12 Brit. Col. 489.

54. One post may be used to designate two placer claims with coterminous boundaries. Wheelden v. Cranston, **1:659,** 12 Brit. Col. 489.

55. Purpose of section 49 of the Placer Act is to protect the rights of surrounding owners and the Crown. Wheelden v. Cranston, **1:659,** 12 Brit. Col. 489.

56. Attempted location of claim upon an existing one held to entitle plaintiff to nominal damages, in absence of evidence of special. Wheelden v. Cranston, **1:659,** 12 Brit. Col. 489.

LOCATION CERTIFICATE.

Admissibility in evidence, see Evidence, 6-8.

LODES.

Existence in placer claims, see Location, 4-6.

MARKING.

Of location, see Location, 29-34.

MECHANICS' AND MINERS' LIENS.

Right in General.

1. The law relating to mechanics' liens is entirely statutory, and parties claiming rights thereunder must bring themselves within the plain terms of the law. Christy v. Union Oil & Gas Co., **1:254,** — Okla. —, 114 Pac. 740.

Priorities.

2. A lien for materials furnished prior to a mortgage takes precedence over the latter although not filed until after the institution of proceedings to foreclose the mortgage. Grant's Pass Banking & Trust Co. v. Enterprise Mining Co.; Condor Water & Power Co. v. Enterprise Mining Co. et al., **1:412,** — Or. —, 113 Pac. 858.

Property Subject.

3. Mill sold under condition that title shall not pass until fully paid for, affixed to the realty, becomes a fixture as to laborers without notice and is subject to their liens. Washburn v. Inter-Mountain Mining Co., **1:90,** — Or. —, 109 Pac. 382. (Annotated)

4. Reference to "roads, tramways, flumes, ditches and pipe lines," etc., in § 5668, B. & C. Comp. as amended in 1907, includes such appurtenances when not situated upon the mine, as those upon the mine are part of the realty and need not be specially mentioned. Washburn v. Inter-Mountain Mining Co., **1:90,** — Or. —, 109 Pac. 382.

5. Use of term "upon any mill site or mill used, owned or operated in connection with such mine" in section 5668, B. & C. Comp. prior to amendment of 1907, had reference to such mill site and mill not situated upon the mine, and the section as amended necessarily includes mill site and mill situated upon the mine. Washburn v. Inter-Mountain Mining Co., **1:90,** — Or. —, 109 Pac. 382.

Persons Entitled.

6. Foreman of mine, who did general work, helped on different things, framed timbers and looked after the work, is entitled to a miner's lien. Washburn v. Inter-Mountain Mining Co., **1:90,** — Or. —, 109 Pac. 382.

7. Every person who deals directly with the owner of the property and who in pursuance of a contract with him performs labor or furnishes material, is an original contractor within the meaning of the statute. Gray v. New Mexico Pumice Stone Co., **1:157,** — N. M. —, 110 Pac. 603.

8. Labor in working in a quarry as a laborer, working as foreman with other laborers, directing them in their work, working at lime-kiln, gathering up tools, closing lime bins, and caring for team of horses, is all within the statute allowing mechanic's lien. Gray v. New Mexico Pumice Stone Co., **1:157,** — N. M. —, 110 Pac. 603. (Annotated)

9. Under a statute giving a subcontractor a right of lien on an oil or gas leasehold to the same extent as the original contractor, an agreement that there shall be no liability until the work is completed is equally binding on the subcontractor. Christy v. Union Oil & Gas Co., **1:254,** — Okla. —, 114 Pac. 740.

Supplies.

10. The word "supplies," as used in the mining lien statute, is defined as "any substance the use of which might reasonably tend to the working or contribute to the development of a mine." Grant's Pass Banking & Trust Co. v. Enterprise Mining Co.; Condor Water & Power Co. v. Enterprise Mining Co. et al., **1:412,** — Or. —, 113 Pac. 858.

11. Electricity is a supply within the meaning of the mining lien statute. Grant's Pass Banking & Trust Co. v. Enterprise Mining Co.; Condor Water & Power Co. v. Enterprise Mining Co. et al., **1:412,** — Or. —, 113 Pac. 858.

Notice.

12. It is not necessary that lien notice state or proof show that labor for which lien is claimed was done on the mill or building to subject them to the lien. Washburn v. Inter-Mountain Mining Co., **1:90,** — Or. —, 109 Pac. 382.

Statement.

13. Under Sec. 2221 of the Compiled Laws of 1897, providing that every person claiming a mechanic's lien must file for record with the county recorder of the county in which the property is situated a claim containing a statement of his demands, etc., with a statement of the terms, time given, and conditions of his contract, it is sufficient as against a demurrer to state that claimant agreed with the owner of the property to work for it for the sum of three dollars a day and board. Gray v. New Mexico Pumice Stone Co., **1:157,** — N. M. —, 110 Pac. 603.

14. Statement in the claim of lien that it is for labor performed by the lien claimant in the construction of the mining claim on the land, is sufficient. Gray v. New Mexico Pumice Stone Co., **1:157,** — N. M., 110 Pac. 603.

Limitations.

15. The right to file a proper lien continues until the expiration of the time allowed to file an original lien, notwithstanding prior unsuccessful attempts. Grant's Pass Banking & Trust Co. v. Enterprise Mining Co.; Condor Water & Power Co. v. Enterprise Mining Co. et al., **1:412,** — Or. —, 113 Pac. 858.

Pleading.

16. A separate demurrer by a subsequent incumbrancer directly raises the question whether the complaint and claim of lien states facts sufficient to constitute a cause of action against the defendant demurring. Gray v. New Mexico Pumice Stone Co., **1:157,** — N. M. —, 110 Pac. 603.

Evidence.

17. Evidence of one who employed men, directed their work, kept their time and was bookkeeper of the mine, that the claimants worked extracting ores and breaking ground in different places on the property, giving the whole amount due and the amounts paid the laborers, is *prima facie* sufficient to sustain a lien. Washburn v. Inter-Mountain Mining Co., **1:90,** — Or. —, 109 Pac. 382.

Marshaling Assets.

18. It is only when there are two properties that the doctrine of marshaling securities can be invoked and it cannot be invoked where mines and mills constitute one property, and neither can be sold separately without a depreciation in value of the other. Washburn v. Inter-Mountain Mining Co., **1:90,** — Or. —, 109 Pac. 382.

Attorneys' Fees.

19. The statute allowing attorneys' fees upon foreclosure of mechanic's lien is constitutional. Gray v. New Mexico Pumice Stone Co., **1:157,** — N. M. —, 110 Pac. 603.

MINERAL RIGHTS.

Sufficiency of evidence to show reservation in burnt deed, see Conveyances, 7.

MINER'S LIEN.

See Mechanics' Liens.

MINES.

See Assessment Work; Location; Patents; Surveys.
Conflict between mining claim and town site patent, see Town Sites.
Construction of mineral lease, see Leases, 6.
Declarations acknowledging existence of a known lode on a placer claim as admissible to defeat record title, see Evidence, 5.
Possession for agricultural purposes as adverse to mining rights, see Adverse Possession, 1.
Trial of mining right by injunction, see Injunctions, 1.

Definitions.

1. A mine is defined as a large opening in the ground made for the purpose of getting metal ores or coal. J. M. Guffey Petroleum Co. v. Murrel, Tax Collector, et al., **1:380,** — La. —, 53 So. 704.

2. The words "mining claim" in the mining country have a certain well-understood meaning, viz., a portion of the public mineral lands of the United States to which qualified persons may first obtain the right of occupancy and possession by means of location and secondly may obtain title by pursuing certain prescribed methods therefor. Gray v. New Mexico Pumice Stone Co., **1:157,** — N. M. —, 110 Pac. 603.

Severance of Surface and Mineral Rights.

3. The severance of the surface and mineral rights is accomplished either by a conveyance of the land with an express reservation of the minerals, or by a conveyance of the minerals or mining rights. J. R. Crowe Coal & Mining Co. v. Atkinson et al., **1:446,** — Kan. —, 116 Pac. 499.

4. Where there is no showing that coal in place is separately assessed or that its existence increased the taxes against the land, the nonpayment of taxes is not in derogation of a claim of ownership in the coal alone. J. R. Crowe Coal & Mining Co. v. Atkinson et al., **1:446,** — Kan. —, 116 Pac. 499.

MORTGAGES.

Parties to Foreclosure.

An instruction that a sheriff's deed could not affect one not made a party to the foreclosure suit may be construed as meaning that his existing rights are not affected thereby. J. R. Crowe Coal & Mining Co. v. Atkinson et al., **1:446,** — Kan. —, 116 Pac. 499.

NATURAL CHANNELS.

Right to conduct appropriated water through, see Appropriation, 32.

NEGLIGENCE.

In operation of pipe lines, see Pipe Lines, 3-8.

Proximate Cause.

Where the evidence is uncontroverted and but one inference could be drawn, the question of proximate cause is for the court. Jennings et al. v. Davis, **1:647,** 187 Fed. 703.

NET PROCEEDS.

Construction of term, see Contracts, 4.

NEW TRIAL.

Newly-Discovered Evidence.

Held, that the court did not err in denying a new trial on the ground of newly-discovered evidence. Flynn Group Min. Co. v. Murphy, **1:619,** 18 Idaho 266, 109 Pac. 851, 138 Am. St. Rep. 201.

NOTICE.

As essential to location, see Location, 25-28.
Of appropriation, see Appropriation, 30, 31.
Of presentation and hearing of petition for irrigation district, see Irrigation Districts, 2, 3.
Of miner's lien, see Mechanics' Liens, 12.

Constructive Notice.

A void instrument cannot impart constructive knowledge to any one. Washoe Copper Co. v. Junila et al. (Hall et al., Interveners), **1:451,** — Mont. —, 115 Pac. 917.

NUISANCE.

Pipe line as nuisance, see Pipe Lines, 3.

OIL.

See Pipe Lines.
Construction of leases, see Leases, 2, 4.
Exploration upon railroad right of way, see Railroads, 4, 5.
Injunction against drilling or operation of well, see Injunctions, 3, 4.
Right of life tenant as to exploration for oil and gas, see Life Estates, 1, 2.

Nature.

Mineral oil is not classed as a mineral within the meaning of the Louisiana Constitution. J. M. Guffey Petroleum Co. v. Murrel, Tax Collector, et al., **1:380,** — La. —, 53 So. 704.

OIL CLAIM.

Diligence.

1. Under the application of the placer mining laws to the oil industry, the locator is protected in his possession only so long as he is with diligence prosecuting the labor of digging his well. McLemore v. Express Oil Co., **1:232,** — Cal. —, 112 Pac. 59.

Homestead Entry.

2. Land held under a homestead entry is not subject to the right of entry for the purpose of exploring for oil without positive proof that the land is more valuable for mineral than for agricultural purposes. McLemore v. Express Oil Co., **1:232,** — Cal. —, 112 Pac. 59.

PARTIES.

To action by co-owner of irrigation ditch for diversion of water, see Ditches, 5.
To actions to determine adverse claims to ditch, see Ditches, 13.
To injunction suits, see Injunction, 7, 8.
In foreclosure, see Mortgages.

PATENTS.

Operation and Effect.

—— In General.

1. Courts will not go behind patents and ascertain from proofs which of disputing parties has the better right, where neither could have by his patent acquired any right or title to the property granted the other by his patent. Butte City Smoke-House Lode Cases, 1:520; 6 Mont. 397, 12 Pac. 858.

2. Patent to mining claim is evidence that the law has been complied with in all proceedings leading up to its issuance, and fixes the mineral character of the claim. Butte City Smoke-House Lode Cases, 1:520, 6 Mont. 397, 12 Pac. 858.

—— Relation Back.

3. The patent to a mining claim relates back to the date of location and protects it. Butte City Smoke-House Lode Cases, 1:520, 6 Mont. 397, 12 Pac. 858. (Annotated)

—— Agricultural Land.

4. A patent to land as agricultural land transfers to the patentee all mineral deposits within its boundaries not known to exist at the time of the patent. Van Ness v. Rooney et al., 1:270, — Cal. —, 116 Pac. 392.

—— Known Mineral Deposits.

5. Mineral deposits whose existence is known do not pass under a patent issued for land subject to disposal or sale. Van Ness v. Rooney et al., 1:270, — Cal. —, 116 Pac. 392.

—— Placer Patent.

6. A placer patent establishes conclusively that the ground was and is placer, and evidence that placer mining operations were never carried on is immaterial. Washoe Copper Co. v. Junila et al. (Hall et al., Interveners), 1:451, — Mont. —, 115 Pac. 917.

Exceptions and Reservations.

7. A patent for land granted to a railroad company expressly excluding and excepting all mineral lands except coal and iron lands, is held to grant only lands nonmineral, the exception being construed as part of the description. Van Ness v. Rooney et al., 1:270, — Cal. —, 116 Pac. 392.

8. Restrictions and exceptions not authorized by law, placed in patent to mining claim by officials of land department, are void. Butte City Smoke-House Lode Cases, 1:520, 6 Mont. 397, 12 Pac. 858.

PETITION.

For organization of irrigation district, see Irrigation Districts, 1.

PIPE LINES.

Interstate Commerce.

1. A statute conserving the supply of natural gas of the State of Oklahoma by prohibiting interstate pipe lines, is unconstitutional as a violation of the interstate commerce clause. Charles West, Attorney General of the State of Oklahoma, Appln't, v. Kansas Natural Gas Co. et al., 1:184, — U. S. —, 31 Sup. Ct. 564.

2. An Oklahoma statute withholding a charter, the right of eminent domain, and the right to use the highways of the state from corporations organized for the purpose of operating interstate pipe lines, held unconstitutional as discriminating and unreasonably burdening interstate commerce. Charles West, Attorney General of the State of Oklahoma, Appln't, v. Kansas Natural Gas Co. et al., 1:184, — U. S. —, 31 Sup. Ct. 564.

Care in Operation.

3. A pipe line is not a nuisance, and liability for fire caused by the escape of oil is limited to a failure to exercise ordinary care in view of the dangerous character of the product conveyed. Jennings et al. v. Davis, 1:647, 187 Fed. 703. (Annotated)

4. An instruction that oil pipe line proprietors are bound to use a degree of care in proportion to the risk of danger attending the handling of such substance is erroneous, because capable of being interpreted as requiring too high a degree of care. Jennings et al. v. Davis, 1:647, 187 Fed. 703.

5. The doctrine of *res ipsa loquitur* is not applicable to the blowing out of a gasket in a joint of a pipe line, thereby permitting the escape of oil. Jennings et al. v. Davis, **1:647,** 187 Fed. 703.

6. The owner of a pipe line upon being notified of the escape of oil is bound to take precautions to prevent its being ignited by the usual and legitimate use of the premises. Jennings et al. v. Davis, **1:647,** 187 Fed. 703.

7. Lighting a fire in the forge of a blacksmith shop with notice of the dangerous proximity of oil which escaped from a pipe line, and permitting pieces of hot iron to fall through cracks in the floor, igniting such oil, constitute negligence. Jennings et al. v. Davis, **1:647,** 187 Fed. 703.

8. The ignition of oil through the negligent act of a blacksmith in lighting a fire in his forge with knowledge of the accumulation beneath his premises of oil escaping from a pipe line, held the proximate cause of the destruction of the premises of a third person. Jennings et al. v. Davis, **1:647,** 187 Fed. 703. (Annotated)

PLACER CLAIMS.

See Location.

PLACER MINES.

Operation and effect of placer patent, see Patents, 6.

PLATS.

Necessity of filing plats of irrigation ditches on unsurveyed land, see Ditches, 10.

PLEADING.

In action to restrain diversion of water, see Injunctions, 9.
In proceeding to enforce mechanics' liens, see Mechanics' Liens, 16.

General Denial.

1. Under general denial it may be shown that plaintiff has no title to the property for the conversion of which the action is brought, but that title thereto is in defendant. Perry v. Acme Oil Company, **1:99,** 44 Ind. App. 207, 88 N. E. 859.

Negative Pregnant.

2. An answer denying that a water company is the owner entitled to the exclusive use of all the waters of a lake is an admission that the water company is entitled to substantially all of the water. Duckworth et al. v. Watsonville Water & Light Co. et al., **1:140,** 150 Cal. 520, 89 Pac. 338.

Estoppel.

3. The facts constituting an estoppel *in pais* must be specially pleaded. Harper v. Hill et al., **1:585,** — Cal. —, 113 Pac. 162.

Forfeiture.

4. Where a claim under another location is set up under the general issue in denial of title, evidence showing its forfeiture is admissible without pleading it. Harper v. Hill et al., **1:585,** — Cal. —, 113 Pac. 162.

POSSESSION.

Of mining claims, see Location, 35-38.

PRESCRIPTION.

Extent of Rights Acquired.

1. The adverse use of water for the purpose of watering stock gives no right to use for irrigation or other purposes. Duckworth et al. v. Watsonville Water & Light Co. et al., **1:140,** 150 Cal. 520, 89 Pac. 338.

Change of Channel.

2. A proprietor of land in which a spring rises from a stream, diverting such stream into an artificial channel and suffering it to remain in its changed condition for a period of time exceeding the statute of limitations, as against persons making a beneficial use of the water in such new or artificial channel, is estopped from returning the water to the natural or original channel to the injury or loss of the persons making such beneficial improvements. *Dictum.* Hollett v. Davis, **1:415,** 54 Wash. 326, 103 Pac. 423.

3. A person making such beneficial use does not have to show a prescriptive right in himself, or a use by himself and predecessors for the period of the statute of limitations, in order to prevent the return of the water to the original channel; all he need show is that the person diverting has permitted the stream to remain in the new channel for the prescriptive period, and that he has made a beneficial use of the water. *Dictum.* Hollett v. Davis, **1:415,** 54 Wash. 326, 103 Pac. 423.

PRIORITIES.

PROXIMATE CAUSE.

PUBLIC LANDS.

Occupants.

1. An occupant of the public lands, in the absence of any showing under town-site or other laws, is a licensee, subject to the rights of one making a valid entry thereon. Zeiger v. Dowdy et al., **1:409**, — Ariz. —, 114 Pac. 565.

Homestead Entry.

2. Under the homestead law, *possessio pedis* is not necessary to complete an entry. McLemore v. Express Oil Co., **1:232**, — Cal. —, 112 Pac. 59.

Entry for Another.

3. A contract by one making entry by virtue of soldier's additional scrip, whereby he agrees to make entry for the use of another, is not against public policy where it does not appear that the usee was not qualified to take patent in his own name. Murray v. White et al., **1:538**, — Mont. —, 113 Pac. 754.

Dummies.

4. In land office practice dummies are either fictitious persons or those having no interest, who permit the use of their names for the perpetration of a fraud, and sign papers and make affidavits perfunctorily. United States v. Munday et al., **1:722**, 186 Fed. 375.

QUIETING TITLE.

Mining Claim.

One in possession of a mining claim under a valid location prior to the issuance of a patent to a railroad company is the equitable owner, entitled to have his title quieted as against the patentee asserting ownership therein. Van Ness v. Rooney et al., **1:270**, — Cal. —, 116 Pac. 392.

RAILROADS.

Drainage of Surface Waters.

1. If a railroad company so constructs its roadbed and ditches as to divert surface water from its usual and ordinary course, and by its ditches or artificial channels causes such water to be conveyed to a particular place and thereby overflow the land of another proprietor, which before the construction of such road, ditches, or channels did not overflow, the company will be liable to such proprietor for the injury. Chicago, Rock Island & Pacific Railway Co. v. Davis, **1:566**, 26 Okla. 434, 109 Pac. 214.

2. Whether the ditches or artificial channels be constructed on the right of way at the time of the construction of the road as a part thereof, or afterwards in the operation or maintenance of the same, is immaterial. Chicago, Rock Island & Pacific Railway Co. v. Davis, **1:566**, 26 Okla. 434, 109 Pac. 214.

Bridges.

3. The rights of a railroad company to bridge over a natural water course crossing its right of way are not superior to those of the public to use the water course for draining lands. Chicago, B. & Q. R. Co. v. Board of Supervisors of Appanoose County, **1:459**, 170 Fed. 665.

Oil and Mineral Rights.

4. A deed conveying a right of way over a tract of land, together with the right to take and use all timber,

earth, stone and mineral within the same, to have and to hold so long as used for a railway, does not convey the right to take oil and minerals from beneath the surface. Gladys City Oil, Gas & Manufacturing Co. et al. v. Right of Way Oil Co. et al., **1:499,** — Tex. —, 137 S. W. 171.

5. The owner of the fee has no right to enter upon the right of way of a railroad company for the purpose of boring for oil. Gladys City Oil, Gas & Manufacturing Co. et al. v. Right of Way Oil Co. et al., **1:499,** — Tex. —, 137 S. W. 171.

Drainage Assessments.

6. A holding company of several railroads has no interest in cases arising from drainage assessment levied against the sub-company. Chicago, B. & Q. R. Co. v. Board of Supervisors of Appanoose County, **1:459,** 170 Fed. 665.

RELOCATION.

See Location, 50-52.
Injunction against relocation, see Injunctions, 5.

RESERVATIONS.

Evidence of reservation of mineral rights, see Conveyances, 7.

RESERVOIRS.

Liability for Bursting or Overflow.

1. Under section 2272, Mills' Ann. St., the owners of reservoirs are liable for all damages arising from leakage or overflows of the waters thereof, and this liability is absolute and not dependent upon the question of care or negligence, and is not relieved by the fact that all that skill and foresight could have suggested to prevent the injury was done. Garnet Ditch & Reservoir Company v. Sampson, **1:610,** 48 Colo. 285, 110 Pac. 79, 1136. (Annotated)

2. The use of a natural hillside as part of the walls or construction of a reservoir does not affect the liability of the owners for the breaking or overflow thereof. Garnet Ditch & Reservoir Company v. Sampson, **1:610,** 48 Colo. 285, 110 Pac. 79, 1136.

3. Whether owner of reservoir may or may not, notwithstanding the statute, be excused from liability upon showing injury was caused by act of God, not decided. Garnet Ditch & Reservoir Company v. Sampson, **1:610,** 48 Colo. 285, 110 Pac. 79, 1136.

4. Act making owners of reservoirs absolutely liable for all damage inflicted by bursting or overflow, is constitutional and valid. Garnet Ditch & Reservoir Company v. Sampson, **1:610,** 48 Colo. 285, 110 Pac. 79, 1136.

5. Section 2272, Mills' Ann. St., regarding liability for damage from leakage or overflow of reservoir was not repealed by implication by Act of 1899, c. 126, the latter referring to reservoirs of certain capacity only and not relieving the owners from liability. Garnet Ditch & Reservoir Company v. Sampson, **1:610,** 48 Colo. 285, 110 Pac. 79, 1136.

RIGHT OF WAY.

Construction of term, see Conveyances, 5.

RIPARIAN RIGHTS.

Right to make an appropriation after grant of riparian rights, see Appropriation, 4.
Construction of conveyance of, see Conveyances, 8.

Nature and Extent.

1. A riparian owner of the greater part of a lake shore and bed has no right in the water by virtue of such ownership except for actual beneficial use on the riparian land. Duckworth et al. v. Watsonville Water & Light Co. et al., **1:140,** 150 Cal. 520, 89 Pac. 338.

2. Riparian proprietors along a water course formed by the flow of water from a spring have the right to insist that the spring be permitted to flow as it is wont to flow by nature, without material diminution or alteration, save where the right to divert is acquired by grant, prescription, or prior appropriation. Hollett v. Davis, **1:415,** 54 Wash. 326, 103 Pac. 423.

3. One purchasing the rights of a riparian owner in a lake need not enter upon such owner's land in order to exercise the right, but may take the water from any point in the lake. Duckworth et al. v. Watsonville Water & Light Co. et al., **1:140,** 150 Cal. 520, 89 Pac. 338.

4. Where one diverts the stream of water flowing from a spring out of its original channel into a new channel,

does not express all, the whole act is not void. The purpose of requiring the subject-matter to be expressed in the title is to prevent and check deceptive litigation. People ex rel. v. Chapman v. Sacramento Drainage District, **1:107,** 155 Cal. 373, 103 Pac. 207.

Construction.

2. The subsequent legislative acts of congress may be considered in arriving at the intent of a particular statute. United States v. Doughten, **1:736,** 186 Fed. 226.

3. In construing a statute the language of which is not clear, the law as it existed prior to the enactment should be considered. National Mines Co. v. Sixth Judicial District Court Humboldt County et al., **1:169,** — Nev. —, 116 Pac. 996.

4. Where an act is equally susceptible of two constructions the court will not presume that a radical change in existing procedure was intended. National Mines Co. v. Sixth Judicial District Court Humboldt County et al., **1:169,** — Nev. —, 116 Pac. 996.

5. Where the same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense throughout. National Mines Co. v. Sixth Judicial District Court Humboldt County et al., **1:169,** — Nev. —, 116 Pac. 996.

6. The word "maintain" as used in statutes in reference to actions, comprehends frequently the institution as well as the support of an action, but in the statute in question it is construed to mean merely the support of an action. National Mines Co. v. Sixth Judicial District Court Humboldt County et al., **1:169,** — Nev. —, 116 Pac. 996.

7. A court cannot override the plain provisions of a statute, and if it is defective and the rights of citizens are not properly protected, resort must be had to the legislature for relief. Seibert v. Lovell et al., **1:261,** 92 Iowa 507, 61 N. W. 197.

8. Where no exception is mentioned in a statute, it must be presumed none was intended, and the courts will not construe away the words of the statute by implying such exception. Garnet Ditch & Reservoir Company v. Sampson, **1:610,** 48 Colo. 285, 110 Pac. 79, 1136.

9. The fact that legislation is novel, demands of the court that it be scrutinized with exceptional care, but it does not dictate its condemnation. People ex rel. Chapman v. Sacramento Drainage District, **1:107,** 155 Cal. 373, 103 Pac. 207.

Partial Invalidity.

10. Where part of a statute is void, and so connected with the general scheme or object sought to be attained by the legislature that the same would not be attained with the void portion stricken out, the whole statute is void. Ross v. Board of Supervisors of Wright County, **1:358,** 128 Iowa 427, 104 N. W. 506, 1 L. R. A. (N. S.) 431.

Retroactive Statutes.

11. The Constitution of Iowa does not forbid the enactment of retroactive laws and the supreme court has frequently upheld the validity of such statutes. Ross v. Board of Supervisors of Wright County, **1:358,** 128 Iowa 427, 104 N. W. 506, 1 L. R. A. (N. S.) 431.

Special Acts.

12. A clear showing is required on the face of the law itself before the courts will say that a special law was not required. People ex rel. Chapman v. Sacramento Drainage District, **1:107,** 155 Cal. 373, 103 Pac. 207.

Curative Acts.

13. Proceedings taken under a void statute which by a subsequent amendment is made valid, may also be validated by the amendment. Ross v. Board of Supervisors of Wright County, **1:358,** 128 Iowa 427, 104 N. W. 506, 1 L. R. A. (N. S.) 431.

14. The legislature may by an amendment cure a constitutional defect in a statute the main purpose of which is within the scope of legislative power, and give such amendment a retroactive effect upon a proceeding already begun and pending under the original statute. Ross v. Board of Supervisors of Wright County, **1:358,** 128 Iowa 427, 104 N. W. 506, 1 L. R. A. (N. S.) 431.

Presumptions.

15. Where the taking of evidence is necessary before action by the legislature, the court will conclusively presume it was taken. People ex rel. Chapman v. Sacramento Drainage District, **1:107,** 155 Cal. 373, 103 Pac. 207.

STIPULATIONS.

Operation and Effect.

A stipulation of counsel to the effect that the interveners have acquired whatever rights were obtained by specified locations does not relieve them from proving the validity of the said locations. Washoe Copper Co. v. Junila et al. (Hall et al., Interveners), 1:451, — Mont. —, 115 Pac. 917.

SURVEY.

Construction of irrigation ditches on unsurveyed public land, see Ditches, 10.

Statutory Provisions.

1. A statute empowering a court, upon proper showing, to order a survey of contiguous mining property although no suit is pending, is not unconstitutional. National Mines Co. v. Sixth Judicial District Court Humboldt County et al., 1:169, — Nev. —, 116 Pac. 996.

2. Section 3 of an act for the protection of mines and mining claims, giving the right to obtain from court an order directing a survey of contiguous mining properties, held not to authorize an order except in a pending suit. National Mines Co. v. Sixth Judicial District Court Humboldt County et al., 1:169, — Nev. —, 116 Pac. 996.

Equity Powers.

3. Courts of equity have the inherent power to order a survey of contiguous mining properties in cases pending before them. National Mines Co. v. Sixth Judicial District Court Humboldt County et al., 1:169, — Nev. —, 116 Pac. 996.

TAXATION.

Listing of Leases or Conveyances.

1. Chapter 244 of the Laws of 1897, providing for the taxation of strata of minerals in land the title to which has been vested in persons other than the owner of the surface, and imposing penalties for its violation, applies to oil and gas, as well as to solid minerals. Mound City Brick & Gas Co. v. Goodspeed Gas & Oil Co., 1:244, — Kan. —, 109 Pac. 1002. (Annotated)

2. When the different strata are severed by contract or conveyance, each layer or stratum is subject to be taxed separately as real property, and it is the duty of the owner not only to record the instrument which conveyed the property to him within the time specified, but also to see that it is duly listed for taxation at the proper time. Mound City Brick & Gas Co. v. Goodspeed Gas & Oil Co., 1:244, — Kan. —, 109 Pac. 1002.

3. Where an instrument, called a "lease," by which the owner of the land grants, conveys, and warrants to another, his heirs, successors, and assigns, all of the coal, oil, and gas under a tract of land, together with the right to use the surface of the land so far as it is necessary in taking out the minerals so conveyed, the consideration being that the lessee shall give the lessor certain quantities of the coal and oil mined, also a certain price per well for each gas well that shall be drilled and used, and also furnish the lessor gas sufficient to supply his residence, and among other things, contains a provision that in a certain contingency the lessee shall reconvey the property to the lessor; *held*, that the instrument operated to sever the coal, oil, and gas from the remainder of the land, and that the interest segregated and conveyed became subject to be separately taxed and it was incumbent on the owner of the interest to list it for taxation. Mound City Brick & Gas Co. v. Goodspeed Gas & Oil Co., 1:244, — Kan. —, 109 Pac. 1002.

Assessment.

4. The J. M. Guffey Petroleum Company is sufficiently described for the purpose of a valid assessment by the name "Guffey Oil Company." J. M. Guffey Petroleum Co. v. Murrel, Tax Collector, et al., 1:380, — La. —, 53 So. 704.

Exemptions.

5. Exemptions from taxation are strictly construed and doubt as to the legislative intent destroys the claim of immunity. J. M. Guffey Petroleum Co. v. Murrel, Tax Collector, et al., 1:380, — La. —, 53 So. 704.

6. An oil well is not a mine, and operation of a well is not a mining operation within article 230 of the Louisiana Constitution exempting property so used from certain classes of taxes. J. M. Guffey Petroleum Co. v. Murrel, Tax Collector, et al., 1:380, — La. —, 53 So. 704.

TENANTS IN COMMON.

Liability for maintenance of irrigation ditch and dam, see Ditches, 3, 4.
Right of action for interference with ditch, see Ditches, 5, 6.
Assessment work on claims held in common, see Assessment Work, 1-3.

TOWN SITES.

Effect of Patent.

1. No interest in or title to a valid mining location can be acquired by a town-site patent. Butte City Smoke-House Lode Cases, **1:520,** 6 Mont. 397, 12 Pac. 858.

2. There is no conflict between a mining claim patent and a town-site patent. They evidence distinct grants, and cannot conflict with one another. Butte City Smoke-House Lode Cases, **1:520,** 6 Mont. 397, 12 Pac. 858.

3. Officers of land department have no authority to convey mining claims by town-site patent or town-site by mining claim patent. Butte City Smoke-House Lode Cases, **1:520,** 6 Mont. 397, 12 Pac. 858.

Adverse Claim.

4. It is not necessary for the owner of a mining location to file an adverse claim to an application for a town-site patent. Butte City Smoke-House Lode Cases, **1:520,** 6 Mont. 397, 12 Pac. 858.

5. Claimants of a town site which includes a mining claim should file adverse claim to application for patent to the mining claim. Butte City Smoke-House Lode Cases, **1:520,** 6 Mont. 397, 12 Pac. 858.

TRIAL.

Adverse possession as question of law, see Adverse Possession, 2.

Objections to Evidence.

1. An objection on the ground that the question is "improper and ought to be a different one" held properly overruled as too general. Morgan v. Myers, **1:494,** — Cal. —, 113 Pac. 153.

Necessity for Findings.

2. Where it is alleged that certain water and riparian rights were conveyed to a certain party, and by that party to defendants, defendants are entitled to a finding upon such issues so as to have rights vested under such conveyances protected by the decree. Duckworth et al. v. Watsonville Water & Light Co. et al., **1:128,** 158 Cal. 206, 110 Pac. 927.

WASTE.

See Life Estates, 3.

WORKING OF CLAIM.

See Assessment Work.

TABLE OF CASES

FOR MORRISON'S MINING REPORTS

B.

F.

G.

I.

Q.

R.

T.

U.

V.

Y.

Z.